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No. 07-

IN THE

Supreme Court of the United States

CLARK COUNTY, A POLITICAL SUBDIVISION OF THE STATE OF NEVADA,

Petitioner,

v.

VACATION VILLAGE, INC., CEH PROPERTIES, LTD., TIMOTHY S. HEERS, TERRIE HEERS THOMPSON, CHERYL D. NOLTE, GARY R. HEERS, AND CATHLEEN HEERS NORCOTT,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a State's recognition and constitutional protection of an unqualified compensable ownership interest in 500 feet of navigable airspace above a landowner's property is preempted by federal laws that confer on the federal government "exclusive sovereignty" over the navigable airspace of the United States and grant the public the right to traverse navigable airspace less than 500 feet above ground level to ensure safe takeoffs and landings of aircraft.

PARTIES TO THE PROCEEDING

All parties to the proceeding are identified in the caption.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
A. Federal Regulation Of Navigable Airspace	5
B. Role Of State And Local Authorities In Protecting Navigable Airspace	7
C. McCarran Airport And Respondents' Property	8
D. Proceedings And Rulings Below	11
REASONS FOR GRANTING THE PETITION	14
THE PREEMPTIVE EFFECT OF FEDERAL LAW ON STATE CONSTITUTIONAL PROTECTIONS OF UNQUALIFIED OWNERSHIP INTERESTS IN THE NAVIGABLE AIRSPACE IS A VITALLY IMPORTANT QUESTION OF FEDERAL LAW	15
A. Federal Law Precludes States From Recognizing, And Protecting Under Their Own Constitutions, Unqualified Ownership Interests In Navigable Airspace	15

TABLE OF CONTENTS—continued

Page

B. Recognition Under State Law Of Private Ownership Of Navigable Airspace Has Deeply Detrimental Implications For The National Air Transportation System 19

C. The Decision In *Jankovich* Did Not Compel The Ninth Circuit To Enforce State Property Laws That Will Inflict Such Significant Harms On The Nation's Aviation System 23

D. The Decision Below Is At Odds With The Rulings Of Other Courts And The Position Of The Federal Government 26

CONCLUSION 30

TABLE OF AUTHORITIES

CASES Page

Air Pegasus of D.C., Inc. v. *United States*, 424 F.3d 1206 (Fed. Cir. 2005) 27, 29
Aircraft Owners & Pilots Ass'n v. *FAA*, 600 F.2d 965 (D.C. Cir. 1979) 16
American Airlines, Inc. v. *Town of Hempstead*, 272 F. Supp. 226 (E.D.N.Y. 1967), *aff'd*, 398 F.2d 369 (2d Cir. 1968) 21
City of Austin v. *Travis County Landfill Co.*, 73 S.W.3d 234 (Tex. 2002) 27
Gregory v. *Ashcroft*, 501 U.S. 452 (1991) 18
Griggs v. *Allegheny County*, 369 U.S. 84 (1962) 3, 16, 24
Indiana Toll Road Comm'n v. *Jankovich*, 193 N.E.2d 237 (Ind. 1963), *cert. dismissed*, 379 U.S. 487 (1965) 24
Jankovich v. *Indiana Toll Road Comm'n*, 379 U.S. 487 (1965) ..... *passim*
Lingle v. *Chevron U.S.A. Inc.*, 544 U.S. 528 (2005) 17
McCarran Int'l Airport v. *Sisolak*, 137 P.3d 1110 (Nev. 2006), *cert denied*, 127 S. Ct. 1260 (2007) 3, 12, 13
Morales v. *Trans World Airlines, Inc.*, 504 U.S. 374 (1992) 25
Northwest Airlines v. *Minnesota*, 322 U.S. 292 (1944) 30
Penn Cent. Transp. Co. v. *City of New York*, 438 U.S. 104 (1978) 12
Southern Pac. Co. v. *Arizona ex rel Sullivan*, 325 U.S. 761 (1945) 19
United States v. *Causby*, 328 U.S. 256 (1946) ... 3, 4, 16, 19, 24
United States v. *City of New Haven*, 496 F.2d 452 (2d Cir. 1974) 27, 28

TABLE OF AUTHORITIES—continued

	Page
United States v. *Little Lake Misere Land Co.*, 412 U.S. 580 (1973)	22
Vorhees v. *Naper Aero Club, Inc.*, 272 F.3d 398 (7th Cir. 2001)	27, 28, 29

CONSTITUTION AND STATUTES

	Page
U.S. Const. art. VI, § 2	1
U.S. Const. amend. V	1
U.S. Const. amend. XIV	1
Air Commerce Act of 1926, ch. 344, 44 Stat. 568	5
Civil Aeronautics Act of 1938, ch. 601, 52 Stat. 973	5
Federal Airport Act, ch. 251, 60 Stat. 170 (1946)	5, 25
49 U.S.C. § 40101(a)(4)	22
§ 40102(a)(32)	6, 16
§ 40103	2, 6, 16
§ 44718	6, 16
§ 47107	*passim*
§ 47107 *et seq.*	5
Nev. Rev. Stat. § 497.040	7
Clark County Ordinance 1221	8

REGULATIONS

14 C.F.R. pt. 77	16
§ 77.1	6
§ 77.3(a)	7
§ 77.11	6
§ 77.23	6
§ 77.25	6, 8
§ 77.35	6
§ 77.43	6
§ 91.119	6, 16

TABLE OF AUTHORITIES—continued

SCHOLARLY AUTHORITIES Page

John W. Gelder, Comment, *Air Law: The Federal Aviation Act of 1958*, 57 Mich. L. Rev. 1214 (1959) 15

2 Kenneth H. Young, *Anderson's American Law of Zoning* (4th ed. 1996) 7

OTHER AUTHORITIES

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FAA, Grant Histories (Aug. 29, 2007), *available at* http://www.faa.gov/airports_airtraffic/airports/aip/grant_histories/ 17

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FAA, Advisory Circular 150/5190-4A, *A Model Zoning Ordinance to Limit Height of Objects Around Airports* (Dec. 14, 1987) 3, 7, 8

Hubble Smith, *Hip To Be Square*, Las Vegas Rev. J., May 20, 2007 11

Del Quentin Wilber, *Overhaul of Air Traffic System Nears Key Step*, Wash. Post, Aug. 27, 2007 4

PETITION FOR WRIT OF CERTIORARI

Petitioner Clark County, Nevada, the owner and operator of McCarran International Airport ("McCarran"), respectfully seeks a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is available at 2007 WL 2284279 (9th Cir. Aug. 10, 2007) (Pet. App. 1a-25a). The judgment of the United States District Court for the District of Nevada is unreported (Pet. App. 26a-30a).

JURISDICTION

The court of appeals entered its judgment on July 23, 2007. It entered an amended opinion on August 10, 2007. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause, Article VI, Section 2, provides: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

The Fifth Amendment provides in part: "[N]or shall private property be taken for public use, without just compensation." The Fourteenth Amendment provides in part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

Section 40103(a)(2) of Title 49 of the United States Code provides in part: "[a] citizen of the United States has a public right of transit through the navigable airspace" of the United States, and section 40102(a)(32) provides that "navigable airspace" "includ[es] airspace needed to ensure safety in takeoff and landing of aircraft." These and other relevant laws are reproduced in Pet. App. 64a-65a.

STATEMENT OF THE CASE

It is difficult to overstate the importance of the question of federal preemption presented by this case; indeed, its outcome will have profound consequences for the continued safe and efficient operation of the nation's air transportation system. Though federal law long ago granted the public the right to traverse the navigable airspace, the Ninth Circuit concluded that federal law does not preclude Nevada from recognizing, and protecting under its own constitution, an unqualified ownership interest in navigable airspace needed to ensure safe takeoffs and landings at McCarran, the sixth busiest airport in the country, and other airports in the state. Under the decision below, any state can nullify the public's right under federal law to travel through navigable airspace, regardless of the detrimental impact on air commerce nationwide or the billions of dollars of takings liabilities airport owners will face. Even if no other state follows Nevada's lead, any response petitioner adopts to avoid or mitigate the massive liabilities it now faces will have untoward ripple effects throughout the highly interdependent aviation system.

The Ninth Circuit's decision is all the more remarkable because it represents an extraordinary departure from the time-tested system created decades ago when Congress claimed exclusive sovereignty over the nation's navigable airspace and granted all citizens a right of transit through it. Congress long ago authorized the Federal Aviation Administration ("FAA") to issue regulations defining the "navigable airspace," and to include within that definition

airspace less than 500 feet above ground level that is necessary to ensure safe takeoffs and landings. The FAA, in turn, relies on local governments to enact zoning laws to prevent hazards in this navigable airspace.

At the same time, Congress and the FAA have recognized that public use of navigable airspace can affect the rights of those who own subjacent land. In *United States* v. *Causby*, 328 U.S. 256, 265-66 (1946), and *Griggs* v. *Allegheny County*, 369 U.S. 84 (1962), this Court held that low and frequent overflights can cause such direct and immediate interference with the enjoyment and use of underlying land as to constitute a compensable taking. In apparent recognition of these constraints, FAA guidance provides that height restrictions designed to prevent hazards in navigable airspace should not be so low as to take the underlying property. See FAA, Advisory Circular 150/5190-4A, *A Model Zoning Ordinance to Limit Height of Objects Around Airports* § 5.d & app. 1, § IV (Dec. 14, 1987). And to avoid such takings, Congress has authorized local governments to prevent hazards by purchasing land or easements with federal funds. See 49 U.S.C. § 47107(c)(1)(A)(i).

This balance between public ownership of navigable airspace and the rights of subjacent landowners had been established for six decades when the Nevada Supreme Court ruled that landowners possess unqualified ownership of the first 500 feet of airspace above their land—including a right to compensation for its use by the flying public—even when that airspace is part of the publicly-owned, navigable airspace needed to ensure safe takeoffs and landings. *McCarran Int'l Airport* v. *Sisolak*, 137 P.3d 1110 (Nev. 2006), *cert denied*, 127 S. Ct. 1260 (2007). The Nevada court also held that its state constitution affords greater protection against takings than the federal constitution. It held that, under the Nevada constitution, landowners suffer a *per se* taking whenever local zoning ordinances designed to promote aviation safety restrict their use of any navigable airspace less than 500 feet above

ground level, whether or not the restriction would give rise to a taking of the subjacent land under the federal constitution.

In the decision below, the Ninth Circuit concluded that it had no choice but to enforce Nevada's court-created unqualified private ownership interest in the navigable airspace because it understood this Court to have rejected a comparable preemption claim in *Jankovich* v. *Indiana Toll Road Comm'n*, 379 U.S. 487 (1965). Pet. App. at 19a. *Jankovich*, however, in no way compels the erroneous result reached below. Not only did *Jankovich* involve a different statute, it dealt with preemption of a traditional state law property right, namely, a claim that a zoning law deprived a property owner of the use and enjoyment of its land. This case, by contrast, is about private ownership of hundreds of feet of navigable airspace—airspace that is necessary for safe take-offs and landings but is not necessary for landowners to use and enjoy their land or to develop it in economically viable ways—and a zoning law that, in restricting future use of this airspace, causes no cognizable taking under the federal Constitution. In *Causby*, this Court recognized that private ownership of such navigable airspace is an affront to "[c]ommon sense." *Causby*, 328 U.S. at 261.

If left undisturbed, the decision in this case will cause the national aviation system immeasurable harm. Current air traffic levels are already placing serious strains on an antiquated system that is experiencing chronic delays due to lack of adequate landing space. See Del Quentin Wilber, *Overhaul of Air Traffic System Nears Key Step*, Wash. Post, Aug. 27, 2007, at A01. As the sixth busiest airport in the country, McCarran is a critical element in the already overtaxed national aviation system—a system critical to the nation's economy. Petitioner conservatively estimates that if Nevada law is allowed to trump federal law, it faces potential *per se* takings liabilities in the *billions* of dollars. Any response it adopts to avoid or minimize this massive liability will have harmful ripple effects throughout the complex and

interdependent air traffic system, increasing air travel costs to and from Las Vegas and adversely affecting air traffic not only at McCarran, but around the country. The petition should be granted, and the decision below reversed.

A. Federal Regulation Of Navigable Airspace.

Congress has long regulated the nation's aviation system. In 1926, Congress passed the Air Commerce Act ("ACA"), which, *inter alia*, invested the Secretary of Commerce with powers to "[e]stablish air traffic rules for the navigation, protection, and identification of aircraft, including rules as to safe altitudes of flight." Air Commerce Act of 1926, ch. 344, § 3(e), 44 Stat. 568, 570. The ACA also established "a public right of freedom of interstate and foreign air navigation" through "navigable airspace" defined as "airspace above the minimum safe altitudes of flight prescribed by the Secretary of Commerce." *Id.* § 10, 44 Stat. at 574.

In 1938, Congress enacted the Civil Aeronautics Act ("CAA"). Under the CAA, the United States was "declared to possess and exercise complete and exclusive national sovereignty in the air space above the United States." Civil Aeronautics Act of 1938, ch. 601, § 1107(i)(3), 52 Stat. 973, 1028. The United States would continue to have sole control over the "navigable airspace," which was defined as "air space above the minimum altitudes of flight prescribed by regulations issued under this Act," *id.* § 1(24), 52 stat. at 979.

In 1946 Congress passed the Federal Airport Act, ch. 251, 60 Stat. 170 (1946), which was the statute at issue in *Jankovich*. Unlike the ACA and CAA, the Airport Act's primary purpose was not to regulate navigable airspace but to develop an extensive system of airports by partially funding their construction costs. *Id.* § 4, 60 stat. at 171-72. The Airport Act was superseded in 1970 by the Airport and Airway Development Act of 1970, which was superseded by the Airport and Airway Improvement Act of 1982, recodified as amended at 49 U.S.C. § 47101 *et seq*.

In 1958, Congress passed the Federal Aviation Act. The Aviation Act created the FAA and again affirmed that "[t]he United States Government has exclusive sovereignty of airspace of the United States." 49 U.S.C. § 40103(a)(1) & historical notes. In addition, the Aviation Act reasserts that Americans have a "public right of transit through the navigable airspace." *Id.* § 40103(a)(2). Under the Aviation Act, navigable airspace is defined as "airspace above the minimum altitudes of flight prescribed by regulations . . . , including airspace needed to ensure safety in the taking off and landing of aircraft." *Id.* § 40102(a)(32) (previously codified as § 40102(a)(30)).

The Aviation Act remains in force today, and requires the FAA to ensure air safety through regulation of the use and scope of navigable airspace. 49 U.S.C. § 40103(b). Pursuant to that delegation, the FAA has established that navigable airspace in uncongested areas begins at an altitude of 500 feet above ground level. 14 C.F.R. § 91.119. However, as mandated by federal statute, navigable airspace begins at lower levels "when necessary for takeoff or landing." *Id.*

Before starting any construction near an airport, a project sponsor must give the FAA notice, whereupon the agency determines whether the construction will pose a hazard to navigable airspace. 49 U.S.C. § 44718; 14 C.F.R. §§ 77.1, 77.11. An object is deemed an obstruction if it exceeds certain absolute height thresholds, or if it would encroach on a defined set of imaginary surfaces that emanate from an airport and its runways. 14 C.F.R. §§ 77.23, 77.25. The FAA may conduct an aeronautical study, including nonadversarial factfinding hearings, to determine if the penetrating structure is a hazard to aviation. *Id.* §§ 77.35, 77.43. The FAA can and often does find that proposed structures are not hazards.

Furthermore, airports, as recipients of federal aviation-related grants, are required by statute to enter into binding grant assurances in which they commit to ensure that airspace is cleared of present and future hazards. 49 U.S.C.

§ 47107(a)(9); 14 C.F.R. § 77.3(a). Airport grant recipients must also commit to adopt "zoning laws . . . to the extent reasonable to restrict the use of land next to or near the airport to uses that are compatible with normal airport operations." 49 U.S.C. § 47107(a)(10).

In the past 10 years, the FAA issued over $155 million in grants for new runways and related improvements at McCarran in reliance upon such assurances. Virtually every public commercial airport in the country receives such grants and is bound by such assurances.[1] Thus, although the federal government has sovereignty over all navigable airspace, including space below 500 feet where necessary for takeoffs and landings, federal regulation of such airspace relies in substantial part on the efforts of state and local authorities to strike the appropriate balance between safe operation and the protection of property rights in the airport's vicinity.

B. Role Of State And Local Authorities In Protecting Navigable Airspace.

Since 1928, local jurisdictions have enacted ordinances and zoning regulations to restrict the height of structures in order to promote air safety. 2 Kenneth H. Young, *Anderson's American Law of Zoning* § 12.38 (4th ed. 1996). More than half of the States, including Nevada, have authorized their political subdivisions to issue regulations designed to protect airspace near airports. *Id.*; see Nev. Rev. Stat. § 497.040.

To facilitate enactment of suitable local zoning laws and compliance with the grant assurance that reasonable steps be taken to obviate obstacles to navigable airspace, FAA issued *A Model Zoning Ordinance to Limit Height of Objects Around Airports*. FAA, Advisory Circular 150/5190-4A (Dec. 14, 1987). In establishing height restrictions near an airport, the model ordinance employs imaginary surfaces akin

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[1] *See* FAA, Grant Histories (June 12, 2006), *available at* http://www.faa.gov/airports_airtraffic/airports/aip/grant_histories/.

to those set forth in the FAA regulation defining navigable airspace hazards, 14 C.F.R. § 77.25, prohibits construction of structures that would constitute a hazard, and provides that variances should be granted only when accompanied by a FAA determination that the construction would not impede or imperil "the operation of air navigation facilities and the safe, efficient use of navigable airspace." FAA, Advisory Circular 150/5190-4A, app. 1, §§ IV, VII.4. At the same time, the FAA guidance provides that height restrictions "should not be so low at any point as to constitute a taking of property without compensation[]." *Id.* § 5.d. Where height restrictions necessary to protect the navigable airspace will give rise to takings, local governments are expected to purchase easements or land, and Congress has authorized them to use federal funds for this purpose. 49 U.S.C. § 47107(c)(1)(A)(i). Numerous local governments, including Clark County, have adopted zoning ordinances that substantially mirror the FAA Model Ordinance. See, *e.g.*, Clark County Ordinance 1221 (Pet. App. 83a-99a).

C. McCarran Airport And Respondents' Property.

When it was first built, McCarran was far from any substantial property development. It remained relatively isolated for decades, and was able to add additional runways as recently as 1991. Sprawling development, however, eventually encroached upon McCarran. Today the Las Vegas "Strip" borders the airport. Clark County Dep't of Aviation, *Comprehensive Annual Financial Report for the Year Ended June 30, 2005*, at 3 (2005). McCarran is the nation's sixth largest airport in terms of total passengers, handling 46 million travelers in 2006. Airports Council Int'l, Traffic Statistics, http://www.aci-na.org/asp/traffic.asp?art=215 (last visited Sept. 5, 2007).

Petitioner ordinarily seeks to protect the navigable airspace through zoning ordinances. However, where restrictions would result in direct and immediate interference with the enjoyment and use of the land, or significant portions of the

land, petitioner has purchased the underlying property. In the last 20 years, petitioner has spent $23.7 million purchasing 65 acres of land around McCarran and another $16.7 million to acquire other property interests. For example, during this period, petitioner bought a 10-acre shopping center and an adjacent 34 acres of vacant land which were across the street from the airport at the north end of Runways 1L/19R and 1R/19L. A new instrument landing system for these runway approaches rendered this surrounding land unusable for many, though not all, commercial purposes.

Respondents are the former owners of a parcel of land comprising 25 acres that lie along Las Vegas Boulevard and are just over one-half mile southwest of the southern end of Runway 1R, which has had the same southern terminus since 1979. Respondents acquired the property, which was then far removed from any developed part of Las Vegas, in 1964 intending to construct a hotel resort and casino. Pet. App. 4a. A portion of the property was zoned as Rural Estates Residential (R-E), and in 1971 respondents sought to rezone this portion as Limited Resort and Apartment (H-1). *Id.* The County partially conditioned approval of the rezoning request on respondents' grant in August 1971 of an avigation easement, although that easement was never recorded. *Id.* at 4a-5a.

With the rezoning completed, respondents were granted a building permit in January 1972 to begin construction on a 344 hotel resort and casino. In 1974, respondents had completed 90% of the 344-room project when they applied for another variance to increase the size of the construction. That application was placed on hold, but respondents were granted a use permit allowing them to complete the 344-room hotel and a 12,000-square foot slot machine arcade. Nonetheless, respondents did not complete the rooms or build the arcade at that time.

In June 1988, respondents filed a request to have the R-E property reclassified as H-1. Pet. App. 5a. The County like-

wise conditioned approval of this request on respondents' grant of a perpetual avigation easement authorizing flights over the property. Respondents granted the easement and the County reclassified the property from R-E to H-1 and granted a use permit for construction and maintenance of a 501-room, two-story hotel, and an 85,000-square-foot casino. *Id.* at 5a-6a. In 1989, respondents continued the construction they had begun back in 1974. *Id.* at 6a.

Several zoning ordinances govern the height of structures on the property. In February 1981, the County enacted Ordinance 728 dealing with structures adjacent to public use airports. Pet. App. 67a-83a. Ordinance 728 set a height limitation demarcated by a plane sloping "twenty (20) feet outward for each foot upward beginning at the end of and at the same elevation as the primary surface" for areas designated as a "Utility Runway Visual Approach Zone." *Id.* at 76a. Ordinance 728 set a height limitation of 150 feet above the airport elevation for areas within a "Horizontal Zone." *Id.* at 79a.

Of particular importance to this petition, the County adopted Ordinance 1221 in 1990 to ensure the safe takeoff and landing of aircraft into McCarran. Under the ordinance, for property in a "Precision Instrument Runway Approach Zone" the applicable height limitation "[s]lopes fifty feet outward for each foot upward beginning at the end of and at the same elevation as the primary surface and extending to a horizontal distance of ten thousand feet along the extended runway centerline." This height limitation creates a "50:1" approach zone. If developers want to build higher, they can seek a "no hazard" determination from FAA and a variance from the County. Pet. App. 6a-7a; *id.* at 91a.

The County also adopted Ordinance 1198, which establishes an "'airport environs overlay district.'" The purpose of Ordinance 1198 is "'to provide for a range of uses compatible with airport accident hazard and noise exposure areas and to prohibit the development of incompatible uses

that are detrimental to the public health, safety and welfare in these airport environs.'" As applied, Ordinance 1198 designates 1.25 acres of respondents' property as a runway protection zone. Pet. App. 7a.

On January 16, 1990, the FAA issued a "Determination of Hazard to Air Navigation" to respondents. The FAA determined that respondents' previously proposed 80-foot sign, 47-foot casino and three 76-foot hotel buildings would penetrate the approach slope for proposed Runway 1R and thus "'would have a substantial adverse impact to the safe and efficient use of navigable airspace and would be a hazard to air navigation.'" Respondents redesigned the proposed construction, limiting the height of the structures to 38 feet above ground level 2,850 feet southwest of the approach end of Runway 1R. On June 27, 1990, the FAA issued a "Determination of No Hazard to Air Navigation" finding that "'[a]lthough the structure has been identified as an obstruction, . . . the proposal would not adversely affect the safe and efficient use of navigable airspace and would not be a hazard to air navigation.'" Pet. App. 6a. Respondents thereafter completed a 315-room, two-story hotel-casino on the property. Though respondents eventually went into bankruptcy, this and adjacent land is currently being developed for 1.5 million square feet of mixed commercial uses with FAA- and County-approved structures. See Hubble Smith, *Hip To Be Square*, Las Vegas Rev. J., May 20, 2007. The developers of this new project have secured financial backing of hundreds of millions of dollars. *Id.*

D. Proceedings And Rulings Below.

In 1993, respondents brought an inverse condemnation of airspace and inverse condemnation of land complaint against the County in Nevada state court. Pet. App. 7a. They argued that, under Article 1, Section 8(6) of the Nevada constitution, the County had inversely condemned their airspace by virtue of Ordinance 1221. Second, respondents argued that

Ordinance 1198 condemned 1.25 acres of their land located in the runway protection zone. *Id.*

In 1997—before trial began—respondent CEH filed a voluntary petition for bankruptcy under Chapter 11 in the United States Bankruptcy Court for the District of Nevada. The inverse condemnation claims were listed as contingent and unliquidated claims as part of respondent's reorganization plan. The next year, respondents removed their inverse condemnation action to the bankruptcy court. Pet. App. 7a-8a.

Following a bench trial, the bankruptcy court concluded that Ordinance 1221 effected a taking of respondents' airspace and awarded them a total of $9,593,940 in damages, fees, and prejudgment interest "for the taking of airspace between the 20:1 approach granted in the 1988 avigation easement and the lower 50:1 precision instrument approach path instituted after the airport expansion."[2] Pet. App. 26a-27a, 28a. The bankruptcy court denied any award under Ordinance 1198 for a taking of respondents' 1.25 acres in the runway protection zone. *Id.* at. 27a. The County appealed and respondents cross-appealed.

While these appeals were pending, a divided Nevada Supreme Court ruled that, under federal and state law, Nevadans own the first 500 feet of airspace above their land. *Sisolak*, 137 P.3d at 1120. The Nevada court concluded that Ordinance 1221 (along with another ordinance not at issue here) caused a *per se* taking of the subject property under both the federal and state constitutions. *Id.* at 1120-26. The majority acknowledged, however, that it was "not unreasonable" to conclude, as the dissenting justices had, that the ordinances were appropriately analyzed under *Penn Central Transportation Co.* v. *City of New York*, 438 U.S. 104 (1978), and thus did not effect a *per se* taking under federal

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[2] The court also granted an award of $528,490 for the taking of ground easements. Pet. App. 28a. The merits of this portion of its decision was not appealed and is not relevant to this petition.

takings law. *Sisolak*, 137 P.3d at 1126. Accordingly, the majority grounded its *per se* takings ruling on the Nevada Constitution, which it concluded was more expansive in its protection of property rights than the federal Takings Clause.

In the decision below, the Ninth Circuit held that, for purposes of federal takings law, Ordinance 1221 is properly analyzed under *Penn Central*'s balancing test and that, under that framework, the ordinance did not cause any compensable deprivation of property. Pet. App. 18a. The court recognized, however, that the Nevada Supreme Court "found that the Nevada Constitution defines takings more broadly than the United States Constitution and that Ordinance 1221 is a *per se* regulatory taking under the Nevada Constitution." *Id.* at 19a (emphasis added). Accordingly, the court had to address petitioner's argument that federal law preempts "*Sisolak*'s application of the Nevada Constitution's takings clause with respect to Ordinance 1221." *Id.*

The Ninth Circuit concluded (Pet. App. 20a) that federal law lacks such preemptive force, based on its view that this Court had rejected a "substantially similar" preemption argument in *Jankovich*, 379 U.S. at 493-95. In *Jankovich*, this Court granted review of an Indiana Supreme Court decision invalidating an airport zoning restriction as an impermissible taking under federal and state law. The *Jankovich* petitioners argued that the state ground of decision was not adequate to sustain the decision because it was "inconsistent with the policy of the Federal Airport Act." *Id.* at 492. This Court rejected that argument, however, and dismissed the writ as improvidently granted, concluding that the Indiana decision did "not portend the wholesale invalidation of all airport zoning laws" and was "compatible with the congressional policy embodied in the Federal Airport Act." *Id.* at 493, 495. In the decision below, the Ninth Circuit deemed these statements "[r]elevant to the present case," and ruled that "the Supremacy Clause does not invalidate the decision of the Nevada Supreme Court finding

that height restrictions in airport zoning ordinances amount to a taking of the underlying property requiring compensation under the Nevada Constitution." Pet. App. 20a. Because the district court had not based its award on *Sisolak*'s grant of a property interest "in the usable airspace above [their] property up to 500 feet," the court of appeals remanded for a determination of just compensation in light of *Sisolak*.

REASONS FOR GRANTING THE PETITION

The question of federal preemption decided by the Ninth Circuit has grave implications for the nation's air transport system. By granting the public a right of transit through navigable airspace needed to take off and land safely at airports, Congress plainly preempted states from recognizing and protecting compensable private ownership rights in such airspace, except where necessary to prevent a taking of the subjacent land itself. The Ninth Circuit's failure to recognize the preemptive force of federal law upsets the careful and time-tested balance Congress has struck between protecting the flying public and the rights of private landowners. Under the decision below, other states can recognize and protect similar property rights, with catastrophic effects for the national aviation system as a whole. And even if no other state follows Nevada's example, the decision below exposes petitioner to massive state takings liabilities for enacting an ordinance that (a) seeks to prevent hazards in navigable airspace that belongs to the public at large and (b) causes no federally cognizable taking of private property. Any efforts the County takes to avoid or minimize this massive expense will have significant and deleterious ripple effects on the efficiency and safety of the complex and highly inter-dependent national aviation system.

Nothing in this Court's decision in *Jankovich* compels these untoward harms. *Jankovich* decided only that a different statute did not preempt a state takings claim that was indistinguishable from, and in fact based upon, a federally

cognizable takings claim—*i.e.*, that a zoning height restriction so interfered with use and enjoyment of land that it caused a compensable taking of the land itself. *Jankovich* in no way suggests that Congress's decision to place this airspace in the public domain can coexist with an extraordinary state law-based right to compensation for public use of navigable airspace that causes no federally cognizable deprivation of the underlying land. Federal law therefore forecloses recognition of the state law ownership right for which respondents were compensated in this case.

The need for this Court's intervention, moreover, is underscored by the fact that the decision below is at odds with the disposition of similar preemption claims by other courts of appeals and with the position the United States has taken in other litigation involving claims to private ownership of the navigable airspace. The Court should grant the petition, reverse the decision below and thereby protect the critical national interests implicated by the erroneous ruling below.

THE PREEMPTIVE EFFECT OF FEDERAL LAW ON STATE CONSTITUTIONAL PROTECTIONS OF UNQUALIFIED OWNERSHIP INTERESTS IN THE NAVIGABLE AIRSPACE IS A VITALLY IMPORTANT QUESTION OF FEDERAL LAW.

A. Federal Law Precludes States From Recognizing, And Protecting Under Their Own Constitutions, Unqualified Ownership Interests In Navigable Airspace.

In 1958, Congress recognized the need for unified control of aircraft flight, both civilian and military, following a number of air crashes. See John W. Gelder, Comment, *Air Law: The Federal Aviation Act of 1958*, 57 Mich. L. Rev. 1214, 1214-15 (1959). That year, Congress passed the Aviation Act to promote and develop air safety through the uniform regulation of the nation's airspace. Building on the

common right of passage on navigable waters, the Aviation Act not only gave the United States "exclusive sovereignty" over the nation's airspace, but also granted all citizens a "public right of transit" through that same space. 49 U.S.C. § 40103(a). The Aviation Act authorizes the FAA to define the "navigable airspace," including any "airspace needed to ensure safety in the takeoff and landing of aircraft." *Id.* § 40102(a)(32).

Pursuant to this mandate, the FAA has established that navigable airspace in uncongested areas begins at an altitude of 500 feet above ground level, but includes lower altitudes when "necessary for takeoff and landing." 14 C.F.R. § 91.119. The FAA defines navigable airspace below 500 feet in a flexible and context-specific fashion. It requires notice of proposed construction that could affect "safety in air commerce" or "the efficient use and preservation of the navigable airspace and of airport traffic capacity at public-use airports." 49 U.S.C. § 44718(a). Upon receipt of such notice, the FAA evaluates a proposal and decides whether it will create a hazard to air traffic. See generally 14 C.F.R. pt. 77. Although these determinations do not compel any particular action by local zoning boards, see, *e.g.*, *Aircraft Owners & Pilots Ass'n* v. *FAA*, 600 F.2d 965, 966-67 (D.C. Cir. 1979), they determine whether a structure will invade the "navigable airspace." See 14 C.F.R. § 91.119 & pt. 77, subpt. C.

At the same time that federal law defines, and confers an absolute right of transit through, the navigable airspace, it seeks to avoid takings of any subjacent land. Such takings can occur from overflights that "are so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land." *Causby*, 328 U.S. at 265-66. See also *Griggs*, 369 U.S. at 88-90 (overflights that rendered house uninhabitable effected a taking). Similarly, zoning laws designed to prevent aviation hazards can themselves be so onerous as to effect takings of underlying property, if, for example, they "completely deprive an owner of '*all*

economically beneficial us[e]' of her property," *Lingle* v. *Chevron U.S.A. Inc.*, 544 U.S. 528, 538 (2005) (alterations in original) (quoting *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992)), or are found, under *Penn Central*'s balancing test, unreasonably to destroy legitimate investment-backed expectations.

To minimize any takings of underlying land, therefore, the Aviation Act states that zoning laws should be used to protect the navigable airspace "to the extent reasonable." 49 U.S.C. § 47107(a)(10). The FAA's model zoning guidance, in turn, provides that height restrictions "should not be so low at any point as to constitute a taking of property without compensation[]." FAA, Advisory Circular 150/5190-4A, § 5.d. Moreover, Congress has authorized use of federal funds to purchase land or easements when necessary to prevent aviation hazards. 49 U.S.C. § 47107(c)(1)(A)(i).[3]

This scheme makes unmistakably clear that Congress intended to bar private ownership of navigable airspace, except insofar as necessary to prevent an uncompensated taking of subjacent land. In this case, however, respondents did not show that Ordinance 1221 caused a deprivation of their underlying land. Having built a casino and hotel on the land, respondents obviously could not show that the

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[3] In 2006, the federal government distributed approximately $3.4 billion dollars in money for airport improvement throughout the *entire country*. See FAA, Grant Histories (Aug. 29, 2007), *available at* http://www.faa.gov/airports_airtraffic/airports/aip/grant_histories/. However, over the last ten years, Clark County has received only $155 million of the federal money available for airport improvement. Moreover, the lion's share of this $155 million was designated for improving the runways at McCarran and other airport facilities, not the purchase of property interests surrounding the airport. Even assuming, however, that all federal monies McCarran receives could be used for this purpose, these funds would be in no way sufficient to offset the billions of dollars at stake here. Indeed, the federal government will be *less* likely to devote any of its limited resources to improving McCarran airport or other Nevada airports in the face of the uncertainty created by the decision below.

ordinance deprived them of all beneficial uses of the property. For these same reasons, respondents could not show that Ordinance 1221 caused a taking under *Penn Central*, as the Ninth Circuit correctly ruled. Instead, respondents were compensated solely for the loss of their state law right to exclude the public from navigable airspace.

The Aviation Act and FAA regulations plainly preempt this state recognition and protection of unqualified private ownership interests in hundreds of feet of navigable airspace. Although state law ordinarily defines the property rights that can give rise to takings claims, the right that Nevada law purports to give landowners to exclude the public from navigable airspace is completely inconsistent with federal law and regulations that place this same airspace in the public domain so that the public may pass through it. Moreover, preemption of this state law right did not give rise to any compensable taking under the federal constitution, because public access to such airspace does not deprive respondents of the use and enjoyment of their land. States may generally afford greater constitutional protection to property rights than the federal constitution does. But a state constitutional right to compensation for public use of navigable airspace that causes no federally cognizable deprivation of the underlying land is inconsistent with Congress's decision to allow the public to traverse this airspace. Such a state constitutional right is thus preempted no less than any other kind of state law. See *Gregory* v. *Ashcroft*, 501 U.S. 452, 455 (1991) (considering whether Missouri constitutional provision for mandatory state judge retirement violated federal Age Discrimination in Employment Act of 1967).

It is simply impossible to reconcile Nevada's recognition and protection of an unqualified ownership interest in navigable airspace needed for safe takeoffs and landings with the Aviation Act and its implementing regulations.

Accordingly, federal law necessarily preempts Nevada's inconsistent property laws.[4]

B. Recognition Under State Law Of Private Ownership Of Navigable Airspace Has Deeply Detrimental Implications For The National Air Transportation System.

It is difficult to overstate the adverse consequences of the Ninth Circuit's conclusion that federal law does not preempt state recognition and protection of private ownership of the navigable airspace. Under the decision below, other states can also grant such ownership rights. *Cf. Southern Pac. Co.* v. *Arizona ex rel Sullivan*, 325 U.S. 761, 775 (1945) (appropriate to consider the cumulative effects of other state attempts to regulate interstate transportation). If they do so, it would "clog" the "public highway[s]" of navigable airspace, "seriously interfere with their control and development in the public interest, and transfer into private ownership that to which only the public has a just claim." *Causby*, 328 U.S. at 261.

But even if no other states follow Nevada's lead, the Ninth Circuit's ruling will still have impacts outside Nevada. The County conservatively estimates that the cost of purchasing the navigable airspace below 500 feet around McCarran could exceed $10 *billion*. Any response to this staggering potential liability would have untoward effects on a host of users and beneficiaries of the national air transportation system.

Even assuming that repeal of Ordinance 1221 would enable the County to avoid future takings liabilities,[5] such a response

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[4] Though this petition addresses the ramifications on McCarran of Nevada's unqualified interest in 500 feet of navigable airspace, other Nevada airports may be similarly affected, including the state's military airports such as Nellis Air Force Base.

[5] Because the *Sisolak* court affirmed a judgment measuring damages from the effective date of Ordinance 1221, it is not clear whether *Sisolak*

would allow landowners to build structures approaching the height of the Washington Monument immediately next to the airport. The construction of just one such building in the glide path of either set of McCarran's runways would effectively close the nation's sixth busiest airport to commercial aircraft.[6] Such a closure would in turn force a re-distribution of air traffic across the country. Repeal of Ordinance 1221 and others like it would thus leave continued operation of a major domestic and international airport at the mercy of private developers.

On the other hand, it is not at all clear that the County could raise the enormous amount of money necessary to purchase all of the "privately-owned" navigable airspace required for McCarran's current operations. And, even if it could pay for all such airspace, doing so would entail equally unacceptable consequences. To cover the estimated $10 billion cost of such airspace, McCarran's landing fees would have to be raised by the equivalent of $43 per passenger.[7] Such a huge increase would make McCarran's landings fees 70% higher than the most expensive landing fees in the nation.

This increase would have a major impact on the airport, the region it serves, and the national air transportation system as a whole. Even if increased fees did not cause a decline in passengers, the huge expense of purchasing that airspace would prevent the County from building Ivanpah, a new

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would permit claims that landowners suffered *per se* takings from the Ordinance's effective date until its date of repeal.

[6] If planes cannot descend below 500 feet until they are over airport grounds, the FAA-prescribed glide angle would force them to land so far down McCarran's runways that commercial aircraft could not stop safely. Due to cross-winds, moreover, McCarran must have both sets of runways available in order to support regularly scheduled commercial service.

[7] Federal grant assurances require airports to be as "self-sustaining as possible," which compels airports to look to airport resources to make up budget shortfalls. 49 U.S.C. § 47107(a)(13)(A). As a result, virtually all airport costs are borne by airport users in one form or another.

supplemental airport 45 miles from Las Vegas that is projected to open in 2017. McCarran itself is expected to reach full capacity as early as 2012. Without Ivanpah, the County cannot meet future passenger demand. And, because airports operating at peak capacity inevitably spawn delays, petitioner's inability to build Ivanpah will burden travelers to and from Las Vegas in future years, and add further strains on the highly complex and interdependent air traffic system. See FAA, *Land Use Compatibility and Airports: A Guide for Effective Land Use Planning*, V-1 (2005), *available at* www.faa.gov/about/office_org/headquarters_offices/aep/planning_toolkit/media/III.B.pdf. ("what happens at an individual airport may affect other airports within the system"); *American Airlines, Inc.* v. *Town of Hempstead*, 272 F. Supp. 226, 233 (E.D.N.Y. 1967) ("Every . . . take-off and landing is a moving part in a vast complex of regional aircraft traffic control"), *aff'd*, 398 F.2d 369 (2d Cir. 1968).

To mitigate these problems, the County may be forced to purchase less than all of the navigable airspace needed to maintain current operations. For example, the County might choose not to purchase certain navigable airspace necessary to ensure the safe departure of aircraft capable of flying to international destinations. This could allow the County to avoid a meaningful portion of the overall liability that *Sisolak*'s un-preempted *per se* takings rule will otherwise impose. But the takings "savings" would come at significant operational costs, at McCarran and elsewhere.

Without this navigable airspace, many types of planes used to provide service to Las Vegas would be unable to take off fully loaded with all of the fuel necessary to make certain long-distance flights, especially in the hotter summer months. If airlines cannot operate such long-distance flights safely or economically out of McCarran, more long-distance travelers would have to switch planes elsewhere in order to reach the city. This would have ripple effects in hubs where Las Vegas-bound or -returning passengers would have to change

planes, and where more flights would be necessary to meet passenger demand to and from Las Vegas. It would also exacerbate congestion at McCarran, as more flights would be needed to carry the number of passengers that currently arrive and depart via fully-loaded aircraft. This, in turn, has implications for the federal government's management and operation of the complex Air Traffic Control system and for airlines and customers at affected hubs. Finally, it would undermine the significant federal investment ($155 million over the past 10 years) made to expand McCarran's capacity in terms of numbers and size of aircraft. *Cf. United States* v. *Little Lake Misere Land Co.*, 412 U.S. 580, 597 (1973) (rejecting "state abrogation" of federal statutory programs because "[c]ertainty and finality are indispensable . . . when, as here, the federal officials carrying out the mandate of Congress irrevocably to commit scarce funds").

In short, because the only court of appeals with jurisdiction to decide the issue has now concluded that federal law does not preempt Nevada's recognition of unqualified private ownership rights in the navigable airspace, the resulting massive takings liability on a major national airport will inescapably and severely undermine the fundamental goals of the Aviation Act, which seeks to maintain the highest degree of safety in air travel, and to promote "the availability of a variety of adequate, economic, efficient, and low-priced services." 49 U.S.C. § 40101(a)(4). The reality is that "[l]ocal planning for airport growth cannot be accomplished without consideration of national, state and regional needs." FAA, *Land Use Compatibility and Airports: A Guide for Effective Land Use Planning*, V-1. Recognition of private ownership of the navigable airspace outside McCarran will place an enormous strain on one of the largest components in this highly complex and interdependent system, and that strain will inescapably burden this vital network as a whole—through sharply increased costs, severely reduced capacity, increased congestion, or (most likely) some combination of

these problems. This Court should therefore grant the petition to forestall these deleterious impacts.

C. The Decision In *Jankovich* Did Not Compel The Ninth Circuit To Enforce State Property Laws That Will Inflict Such Significant Harms On The Nation's Aviation System.

This Court's decision in *Jankovich* v. *Indiana Toll Road Comm'n*, 379 U.S. 487 (1965), did not address the preemption issue raised in this case or one "substantially similar" to it, and thus did not compel the Ninth Circuit to enforce state legal rules that will inflict such serious harms on the nation's aviation system. To the contrary, *Jankovich* involved an entirely different type of takings claim and, more importantly, a different statute. The lower court's reliance on *Jankovich*, therefore, was entirely misplaced.

Jankovich involved a local ordinance that imposed an 18-foot height limit on toll road property, thereby barring operation of a toll road. *Id.* at 488. After this Court granted review of a state court decision invalidating the ordinance as a taking under both federal and state law, the property owner argued that this Court lacked jurisdiction because the state-law takings ruling was an independent and adequate basis for the decision. In response, the airport operators argued that the state law ruling could not sustain the decision because it was inconsistent with federal law. They argued that the state court had made broad pronouncements that "signif[ied] the total nullification of airport zoning," and that such state-law nullification of airport zoning was preempted by "the policy of the Federal Airport Act," which deemed local airport zoning "essential to assur[ing] compatible land use" near airports. *Id.* at 492-93 (summarizing airport operators' argument).

This Court deemed this preemption claim "insubstantial" because its premise—that the Indiana Supreme Court's opinion signaled state nullification of zoning law—was

"unfounded." *Id.* at 492-93 & n.2. The Indiana court had "recognized that zoning regulations may be upheld as a reasonable exercise of the police power where the owner of property is merely restricted in the use and enjoyment of his property," but it found a taking in the case before it "because the City of Gary has attempted, by passage of the ordinance under consideration, to take and appropriate to its own use *the ordinarily usable* air space of property adjacent to the Gary Airport." *Id.* at 493 (internal quotation marks omitted). Such a ruling, this Court concluded, did "not portend the wholesale invalidation of all airport zoning laws." *Id.*

In dismissing the preemption claim advanced by the airport operators in *Jankovich*, this Court plainly did not address a claim "substantially similar" to the one raised here. Pet. App. 20a. First, the *Jankovich* property owner asserted a traditional takings claim—*i.e.*, that a zoning restriction deprived it of the use of its land. In resolving that claim, the Indiana Supreme Court expressly relied on *Causby* and *Griggs* for the proposition that "the *reasonable and ordinary use* of air space above land is a property right which cannot be taken without payment of compensation." *Indiana Toll Road Comm'n* v. *Jankovich*, 193 N.E.2d 237, 240 (Ind. 1963) (emphasis added). *Causby* and *Griggs*, in turn, both tied compensation for the loss of superadjacent airspace to situations in which that loss affected the use and enjoyment of the underlying land. As the Court explained in *Griggs*:

> [T]he use of land presupposes the use of some of the airspace above it. Otherwise no home could be built, no tree planted, no fence constructed, no chimney erected. An invasion of "the superadjacent airspace" will often "affect *the use of the surface of the land itself.*"

369 U.S. at 89 (citation omitted) (citing and quoting *Causby*, 328 U.S. at 264-65; emphasis added). See also *Causby*, 328 U.S. at 264 (concluding that the overflights in that case caused "as much an appropriation of the use *of the land* as a more conventional entry upon it") (emphasis added).

Here, respondents were not compensated for loss of the use of the "reasonable and ordinary" airspace necessary to enjoy and use their property, upon which they built a 315-room hotel and casino. They were compensated for loss of a state law right to exclusive ownership of all navigable airspace up to 500 feet above their land. *Jankovich* did not address whether federal law preempted such an extraordinary state law right.

Second, *Jankovich* involved an entirely different statute—the Airport Act. This Court has made clear that the question of preemption is "at bottom, . . . *one of statutory intent, and we accordingly begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purposes.*" *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992) (internal quotation marks omitted) (emphasis added). Accordingly, it is not possible to make any sound conclusions about the preemptive effect of one statute—namely, about what its language means or what Congress's intent was—by looking at the language and history of another statute.

In fact, the Airport Act is fundamentally different from the Aviation Act. Congress enacted the Airport Act to fund part of the costs of constructing new airports. Ch. 251, § 4, 60 Stat. at 171-72. That Act did not define the navigable airspace, confirm its place in the public domain or grant the public a right of transit through such airspace. Instead, the *Jankovich* petitioners could glean from the Airport Act only a determination that "airport zoning is essential to assure compatible land use in the vicinity of airports without prohibitive cost." 379 U.S. at 493. No serious claim could be advanced that, by making that determination, Congress intended to preclude state courts from recognizing, under their state constitutions, a right to compensation for a land-impairing loss of airspace that was, in all material respects, identical to the right to compensation recognized in *Causby*

and *Griggs*. Indeed, as explained above, even the Aviation Act does not purport to preempt such state law rights.

The Aviation Act and its implementing regulations, however, necessarily *do* preempt state-law recognition and protection of an unqualified right to exclude the public from up to 500 feet of navigable airspace needed to ensure safe takeoffs and landings. By placing this same airspace in the public domain and giving the public a right to pass through it, it is clear that "Congress intended to preclude such an application of state law," *Jankovich*, 379 U.S. at 494, where, as here, public use of the airspace causes no federally cognizable taking of the underlying land. The Ninth Circuit's contrary ruling is plainly incorrect, and should be reversed to forestall the extraordinary and untoward consequences that Nevada's expansive definition and protection of property rights will have on McCarran and the national aviation system as a whole.

D. The Decision Below Is At Odds With The Rulings Of Other Courts And The Position Of The Federal Government.

The grave implications of the Ninth Circuit's erroneous preemption ruling involve matters of such urgent national importance that further review by this Court is plainly warranted. But review is also warranted because the decision below is at odds with lower court decisions addressing similar preemption issues and with the position of the federal government in cases involving the public's right to use the navigable airspace. Although these decisions and government pronouncements may not reflect the type of "square" conflict in the circuits that inexorably leads to review by this Court, they confirm that cases involving claims of private ownership of the navigable airspace are recurring, that the Ninth Circuit's view of preemption is insupportable, and that other courts and the federal government have consistently recognized the preeminence of federal law in defining, regulating and ensuring public access to navigable airspace.

First, the Federal Circuit has recognized that "[p]rivate property interests simply do not, as a general matter, exist in the navigable airspace of the United States." *Air Pegasus of D.C., Inc.* v. *United States*, 424 F.3d 1206, 1219 (Fed. Cir. 2005). Accordingly, the Federal Circuit held that the plaintiff had no cognizable property interest because "it is well established under federal law that the navigable airspace is public property not subject to private ownership." *Id.* at 1217. Other courts have likewise concluded that federal law precludes recognition of a state-law property right in navigable airspace. See, *e.g.*, *City of Austin* v. *Travis County Landfill Co.*, 73 S.W.3d 234, 242 (Tex. 2002) (rejecting takings claim based on invasions of airspace above property on the ground that a landowner "has no right to exclude overflights above its property, because airspace is part of the public domain").

The Ninth Circuit, by contrast, has concluded that, while the Aviation Act places navigable airspace in the public domain, it does not preclude states from subjecting that same airspace to private ownership, even where such ownership is not necessary to ensure use and enjoyment of the underlying land. To be sure, *Air Pegasus* and *City of Austin* did not address this Court's decision in *Jankovich*, and thus cannot be said to conflict squarely with the decision below. Nevertheless, the logic of the Ninth Circuit's ruling in this case would suggest that these holdings were wrong.

The decision below is also at odds with the Second Circuit's decision in *United States* v. *City of New Haven*, 496 F.2d 452, 454 (2d Cir. 1974), and the Seventh Circuit's decision in *Vorhees* v. *Naper Aero Club, Inc.*, 272 F.3d 398 (7th Cir. 2001). In *City of New Haven*, East Haven sued to enjoin New Haven from implementing a runway extension because New Haven had failed to obtain the necessary authorization under state law to purchase land in East Haven for a runway "clear zone." The Connecticut courts agreed with East Haven and enjoined the runway plan, whether it

took "'the form of physical expansion or the mere maintenance of clear zones over property located in East Haven.'" 496 F.2d at 453.

The United States subsequently brought suit in federal court, claiming that the state law injunction was preempted. The district court agreed, and the Second Circuit affirmed. The court of appeals explained that "the airspace above the East Haven land acquired by New Haven" was "part of the navigable airspace." *Id.* at 454. Noting that state legislation that purported "'to deny access to navigable air space would . . . constitute a forbidden exertion of the power which the federal government has asserted,'" the Second Circuit concluded that "East Haven cannot enforce its rights under Connecticut law by obtaining a state court injunction which infringes on federal regulation of navigable airspace." *Id.*

In this case, there is no injunction barring access to the navigable airspace. But a state law right to exclude the public from such airspace unless billions of dollars in damages are paid effectively bars such access. Indeed, as petitioner has explained, the massive liability it faces from numerous lawsuits like respondents' creates hydraulic pressure to concede the navigable airspace to the subjacent landowner.

Similarly, *Vorhees* involved a claim that overflights gave rise to a trespass under state law, entitling the property owner to an injunction. The suit had been removed from state court, and under the "well-pleaded" complaint rule, could be adjudicated in federal court only if federal aviation laws involved the type of "complete preemption" that makes it impossible to frame any state-law claim. 272 F.3d at 402. The Seventh Circuit concluded that the Aviation Act was not one of the rare statutes, like the Employee Retirement Income Security Act or § 301 of the Labor Management and Relations Act, that effect such "complete preemption." *Id.* at 403. Nevertheless, it made clear that the trespass claim was certainly preempted as a matter of conflict preemption principles, *id.*, and that it would therefore "be difficult at best

to convince a state court that the claim about trespass to airspace . . . would not interfere with the federal regulatory apparatus." *Id.* at 405. Although these statements are dicta, they reflect yet another circuit's recognition that federal law necessarily preempts state laws that purport to give private parties the right to exclude the public from the federally defined navigable airspace.

Finally, the United States has consistently maintained that federal law precludes private ownership of the navigable airspace, unless the public's use of that airspace—or zoning laws designed to prevent aviation hazards—effect a federal taking of the subjacent land. Thus, in *Air Pegasus*, the government argued that navigable airspace is "not available for private ownership." 424 F.3d at 1214 (noting government's position). More recently, the government argued in a First Circuit case that, absent some pre-existing use of airspace, ownership of land "never include[s] the right to exclude the public from the navigable airspace above [the] land." See Opp. of United States at 13, *Breneman* v. *United States*, 381 F.3d 33 (1st Cir. 2004), *available at* 2003 WL 23899334.

As Justice Jackson eloquently observed over 60 years ago:

> the landowner no more possesses a vertical control of all the air above him than a shore owner possesses horizontal control of all the sea before him. The air is too precious as an open highway to permit it to be "owned" to the exclusion or embarrassment of air navigation by surface landlords who could put it to little real use.
>
> Students of our legal evolution know how this Court interpreted the commerce clause of the Constitution to lift navigable waters of the United States out of local controls and into the domain of federal control. Air as an element in which to navigate is even more inevitably federalized by the commerce clause than is navigable

> water. Local exactions and barriers to free transit in the air would neutralize its indifference to space and its conquest of time.

Northwest Airlines v. *Minnesota*, 322 U.S. 292, 303 (1944) (Jackson, J., concurring) (citation omitted).

In *Causby* and *Griggs*, this Court acted in the absence of lower court divisions[8] to address fundamentally important questions that the advent of modern aviation posed for the rights of owners of land beneath navigable airspace. In the ensuing decades, Congress, the FAA and local authorities have faithfully adhered to the decisions of the Court in those cases, defining and regulating the navigable airspace, using local zoning to protect safety in that airspace and purchasing land and easements (or paying takings damages) when the demands of aviation safety interfere with the use and enjoyment of underlying land. Because the decision below completely undermines the balance struck in those decisions, the Court must act now to restore the careful equilibrium of public and private interests that are essential to a safe and efficient national aviation system, and that federal law mandates.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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[8] *See Causby*, 328 U.S. at 258 (noting that writ of certiorari was granted "because of the importance of the question presented"); *Griggs*, 369 U.S. at 84 (review granted because the lower court's decision "seemed to be in conflict with *United States* v. *Causby*").

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APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

Nos. 05-16173, 05-16389, 05-16406,
05-16554. Adv. No. 98-2313-RCJ

VACATION VILLAGE, INC.,
Plaintiff-Appellee,

v.

CLARK COUNTY, NEVADA,
Defendant-Appellant.

VACATION VILLAGE, INC.,
Plaintiff-Appellant,

v.

CLARK COUNTY, NEVADA,
Defendant-Appellee.

IN RE CEH PROPERTIES, LTD.,
Debtor,

VACATION VILLAGE, INC.,
Plaintiff-Appellee,

v.

CLARK COUNTY, NEVADA,
Defendant-Appellant.

IN RE CEH PROPERTIES, LTD.,
Debtor,

VACATION VILLAGE, INC.,
Plaintiff-Appellant,

v.

CLARK COUNTY, NEVADA,
Defendant-Appellee.

Argued and Submitted April 16, 2007
Filed July 23, 2007
Amended Aug. 10, 2007

Appeal from the United States District Court for the District of Nevada; Robert C. Jones, District Judge, Presiding. D.C. No. CV-05-00010-RCJ.

Before WARREN J. FERGUSON, STEPHEN REINHARDT, and MILAN D. SMITH, JR., Circuit Judges.

ORDER AMENDING OPINION AND AMENDED OPINION

MILAN D. SMITH, JR., Circuit Judge:

ORDER

The opinion filed on July 23, 2007 at slip op. 8849 is hereby AMENDED as follows:

Delete the paragraph at slip op. 8861 beginning "The *Rooker-Feldman* doctrine holds that" and the paragraph at slip op. 8861-62 beginning "Here, the state court stated" and replace with:

> "The *Rooker-Feldman* doctrine . . . is confined to . . . cases brought by state court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." *Exxon Mobil Corp. v. Saudi Basic Indus.*,

> 544 U.S. 280, 284 (2005). Thus, *Rooker-Feldman* "applies only when the federal plaintiff both asserts as her injury legal error or errors by the state court *and* seeks as her remedy relief from the state court judgment." *Kougasian v. TMSL, Inc.*, 359 F.3d 1136, 1140 (9th Cir. 2004) (emphasis in original). *See also Noel v. Hall*, 341 F.3d 1148, 1154-65 (9th Cir. 2003).

Here, the state court stated only that it *would* dismiss the case *if and when* the statute of limitations in Nevada Rule of Civil Procedure 41(e) expired. Neither the state court's observation that Rule 41(e) would require it to dismiss the case in a matter of days when the mandatory five-year deadline passed, nor the minute order reflecting the state court's unavailability for trial, is the equivalent of an actual order dismissing Landowners' action. Because there was no state court judgment from which the Landowners sought relief, *Rooker-Feldman* does not apply to bar federal jurisdiction over Landowners' claims.

Pursuant to General Order 5.3, this amendment does not affect current deadlines for filing a petition for rehearing or petition for rehearing en banc.

IT IS SO ORDERED.

OPINION

Appellees, the owners of real property near McCarran International Airport in Las Vegas, Nevada, brought an inverse condemnation action against Clark County (County) alleging that the County's Ordinances 1221 and 1198, which impose, respectively, height and use restrictions, constitute takings under the Nevada Constitution. We hold that our review of Ordinance 1221 is limited by the Nevada Supreme Court's decision in *McCarran Int'l Airport v. Sisolak*, 137 P.3d 1110 (Nev. 2006) construing Nevada state law, and, accordingly, find that Ordinance 1221, as applied to Appellee's property, amounts to a taking. We remand for a

calculation of just compensation in light of *Sisolak*. We affirm the district court's decision that Ordinance 1198 did not effect a taking of Appellee's property.[1]

I. BACKGROUND

For more than 50 years, the County has regulated land near McCarran Airport through the adoption of zoning ordinances. As a result of its proximity to the airport, the real property owned by Appellees (collectively, the Landowners)[2] has been encumbered by a number of these ordinances.

The Landowners acquired the subject property in 1964, intending to construct a hotel resort and casino. A portion of the property was zoned as Rural Estates Residential (R-E), and in 1971 the Landowners sought to rezone this portion as Limited Resort and Apartment (H-1). The County partially conditioned approval of the Landowners' rezoning request on the Landowners' granting of the following avigation easement:

> [The County] is to have a perpetual right of flight, ingress to and egress from the airspace over the lands herein above described, in conformity with the air traffic rules governing the flight of aircraft to and from the Clark County Airport. . . . It is further understood and agreed that the grantor himself, his heirs, successors or assignees . . . shall and do hereby release, and agree to save harmless and indemnify, the County of Clark from any claims whatsoever for losses caused by noise or the psychological effects of aircraft.

(First Easement). By 1974, the Landowners had completed a number of rooms, but not the entire building. The parties did

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[1] We address the remaining issues raised by both parties on appeal in a concurrently filed memorandum disposition.

[2] In ways not relevant to our decision, the ownership of the subject property has been transferred several times. For convenience, we use the term "Landowners" to refer to the then relevant fee holder(s) throughout this opinion.

not complete the rezoning and the First Easement was not recorded.

In February 1981, the County enacted Ordinance 728 at Chapter 29.50 of the Clark County Code in order to limit the height of structures adjacent to public use airports. Ordinance 728 set a height limitation demarcated by a plane sloping "twenty (20) feet outward for each foot upward beginning at the end of and at the same elevation as the primary surface" for areas designated as a "Utility Runway Visual Approach Zone." The parties refer to this height limitation as a "20:1" slope surface. Ordinance 728 set a height limitation of one hundred fifty feet above the airport elevation for areas within a "Horizontal Zone."

In June 1988, the Landowners filed another rezoning request with the County to have the R-E property reclassified as H-1. The County conditioned its approval of the Landowners' rezoning request on the Landowners' granting the following avigation easement:

> It is understood and agreed that [the County is] to have perpetual right of flight, for the passage of aircraft in the air space above the surface of said premises, together with the right to cause in said air space such noise as may be inherent in the operation of aircraft, now known or hereafter used for navigation of or flight in the air using said air space or landing at, or taking-off from or operating at, or on the premises known as McCarran International Airport. . . .
>
> It is further understood the GRANTOR does hereby agree for himself to release Clark County, Nevada, and operators and users of the above described airfields from any claims whatsoever for losses hereafter caused by noise or the psychological effects of aircraft noise resulting from the overflight of aircraft.

(Second Easement). The Landowners granted the Second Easement to the County on June 21, 1988. The County reclassified the property from R-E to H-1 and granted a use permit to the Landowners to construct and maintain a 501-room, two-story hotel, and an 85,000-square-foot casino. According to the Landowners, construction under the proposed design plans began in 1989.

On January 16, 1990, the Federal Aviation Administration (FAA) issued a "Determination of Hazard to Air Navigation" to the Landowners. The FAA determined that the Landowners' previously proposed 80-foot sign, 47-foot casino and three 76-foot hotel buildings would penetrate the approach slope for proposed Runway 1R and thus "would have a substantial adverse impact to the safe and efficient use of navigable airspace and would be a hazard to air navigation."

The Landowners redesigned the proposed construction limiting the height of the structures on the property to 38 feet above ground level 2,850 feet southwest of the approach end of Runway 1R. On June 27, 1990, the FAA issued a "Determination of No Hazard to Air Navigation" finding that "[a]lthough the structure has been identified as an obstruction, . . . the proposal would not adversely affect the safe and efficient use of navigable airspace and would not be a hazard to air navigation."

On July 18, 1990, the County passed Ordinance 1221 which amended Chapter 29.50 of the Clark County Code. For property in a "Precision Instrument Runway Approach Zone" the applicable height limitation "[s]lopes fifty feet outward for each foot upward beginning at the end of and at the same elevation as the primary surface and extending to a horizontal distance of ten thousand feet along the extended runway centerline." The parties refer to this height limitation as a "50:1" slope surface. Despite this height limitation, Ordinance 1221 provides that it should not be "construed as prohibiting the construction or maintenance of any structure to a height up to

thirty-five feet above the surface of the land in any zone." Ordinance 1221 also requires that before the construction of new buildings and structures in these zones, the FAA and the Clark County Department of Aviation must first determine that "it does not constitute a hazard."

The County also adopted Ordinance 1198 at Chapter 29.51 of the Clark County Code. Ordinance 1198 establishes an "airport environs overlay district." The stated purpose of the ordinance is "to provide for a range of uses compatible with airport accident hazard and noise exposure areas and to prohibit the development of incompatible uses that are detrimental to the public health, safety and welfare in these airport environs." As applied, Ordinance 1198 designates 1.25 acres of the Landowners' property as a runway protection zone (RPZ). Such designation limits the development of the 1.25-acre parcel to uses such as a parking lot, a water area, or landscaping.

On December 17, 1993, the Landowners filed a complaint in Nevada state court alleging, among other things, inverse condemnation of airspace and inverse condemnation of 1.25 acres in the RPZ. A jury trial was originally scheduled for March 11, 1996 but was continued to March 24, 1997 due to the Landowners' illness. At the Landowners' request, the state court set a new trial date of September 22, 1998.

On October 7, 1997, the Landowners filed a voluntary petition for bankruptcy under Chapter 11 in United States Bankruptcy Court for the District of Nevada and listed their inverse condemnation claims against the County as a contingent and unliquidated claim in their Schedule of Personal Property. The bankruptcy court confirmed the reorganization plan on November 24, 1998.

Meanwhile, in Nevada state court, the Landowners reported on September 23, 1998 that they were not ready to proceed with trial. No other trial dates were available before the expiration of the five-year limitations period for bringing

a case to trial under Nevada Rule of Civil Procedure 41(e). The state court denied the Landowners' request to "put on one witness, put on a little bit of testimony" to satisfy the rule, and stated that absent a waiver of the limitations period by the County, the case would be automatically dismissed when the limitations period ran under Rule 41(e).

The Landowners then filed a motion requesting that the period following October 7, 1997, when the bankruptcy petition was filed, not be counted in determining the five-year period for trial under Rule 41(e) because an "automatic stay" applied. The state court denied the Landowners' motion, finding that no automatic stay was in place.

The Landowners next sought relief in the bankruptcy court from the same alleged stay. The bankruptcy court judge, Judge Robert C. Jones, opined that he did not "think there's a stay in any event to lift," but nevertheless granted the Landowners' motion to lift "the stay." The Landowners thereupon removed their inverse condemnation claims to the bankruptcy court pursuant to 28 U.S.C. § 1452 and Rule 9027 of the Federal Rules of Bankruptcy Procedure. Following the County's motion for partial summary judgment, the Landowners filed a second amended complaint in which they continued to assert their inverse condemnation claims under the Nevada Constitution.

In April 2002, the case proceeded to a bench trial in the bankruptcy court before Judge Jones. Both parties consented to the entry of a final order or judgment by the bankruptcy judge. Judge Jones was subsequently confirmed as a federal district judge for the district of Nevada, and a year after his confirmation, he issued Findings of Fact and Conclusions of Law in this case that he signed as a "United States Bankruptcy Judge." Relevant to the issues discussed in this opinion, Judge Jones (1) awarded the Landowners compensation from the County for the taking of airspace as a result of Ordinance 1221; (2) determined that Ordinance 1198 did not re-

sult in a taking of the 1.25 acres in the RPZ; and (3) awarded the Landowners compensation from the County for the taking of certain ground easements.[3]

On January 4, 2005, Judge Jones, in his capacity as a district court judge, entered an order sua sponte withdrawing the bankruptcy reference. Judge Jones then entered a final judgment awarding the Landowners $10,121,686.63 in damages, fees, and prejudgment interest.

The County appealed and the Landowners cross-appealed.

II. GENERAL STANDARDS OF REVIEW

On appeal from a bankruptcy court's decision, we afford no deference to the prior decision of the district court. We review the bankruptcy court's conclusions of law de novo and the bankruptcy court's factual findings for clear error. Thus, "we accept findings of fact made by the bankruptcy court unless these findings leave the definite and firm conviction that a mistake has been committed by the bankruptcy judge." *In re Rains*, 428 F.3d 893, 900 (9th Cir. 2005) (quoting *Latman v. Burdette*, 366 F.3d 774, 781 (9th Cir. 2004)).

III. PRELIMINARY ISSUES

We first address a number of global challenges to the existence and exercise of jurisdiction in this case.

A. Rooker-Feldman

The County argues that the district court lacked subject matter jurisdiction under the *Rooker-Feldman* doctrine because any judgment rendered by that court "undercut the state

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[3] The final judgment includes a $287,781 award for the taking of certain ground easements plus prejudgment interest. The County does not appeal the district court's finding that there was a taking of the ground easements; the County only appeals the compensation award regarding the ground easements for (1) lack of subject matter jurisdiction and (2) excessive interest. We address the former argument in this opinion and the latter in the concurrently filed memorandum disposition.

court's ruling regarding dismissal, which was inextricably intertwined with the state law claims that the Landowners intended to pursue in the adversary proceeding." We disagree.

"The *Rooker-Feldman* doctrine . . . is confined to . . . cases brought by state court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." *Exxon Mobil Corp. v. Saudi Basic Indus.*, 544 U.S. 280, 284 (2005). Thus, *Rooker-Feldman* "applies only when the federal plaintiff both asserts as her injury legal error or errors by the state court *and* seeks as her remedy relief from the state court judgment." *Kougasian v. TMSL, Inc.*, 359 F.3d 1136, 1140 (9th Cir. 2004) (emphasis in original). *See also Noel v. Hall*, 341 F.3d 1148, 1154-65 (9th Cir. 2003).

Here, the state court stated only that it *would* dismiss the case *if and when* the statute of limitations in Nevada Rule of Civil Procedure 41(e) expired. Neither the state court's observation that Rule 41(e) would require it to dismiss the case in a matter of days when the mandatory five-year deadline passed, nor the minute order reflecting the state court's unavailability for trial, is the equivalent of an actual order dismissing Landowners' action. Because there was no state court judgment from which the Landowners sought relief, *Rooker-Feldman* does not apply to bar federal jurisdiction over Landowners' claims.

B. "Related to" Jurisdiction under § 1334(b)

The County also challenges whether subject matter jurisdiction over the case lies under 28 U.S.C. § 1334(b), which provides that federal courts shall have "original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to a case under title 11." In *Celotex Corp. v. Edwards*, 514 U.S. 300 (1995), the Supreme

Court described the scope of "related to" jurisdiction under § 1334(b):

> Proceedings "related to" the bankruptcy include (1) causes of action owned by the debtor which become property of the estate pursuant to 11 U.S.C. § 541, and (2) suits between third parties which have an effect on the bankruptcy estate. . . . The first type of "related to" proceeding involves a claim like the state-law breach of contract action at issue in *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 102 S.Ct. 2858, 73 L.Ed.2d 598 (1982).

Id. at 307 n. 5 (internal citation omitted). Where the cause of action is not of the first type of proceeding identified in *Celotex*-owned by the debtor which becomes property of the estate in bankruptcy-courts are concerned with the closeness of the relationship between the proceeding and the bankruptcy estate. *See, e.g., Pacor Inc. v. Higgins*, 743 F.2d 984, 994 (1984) (holding that where the cause of action is between third parties, the test for "whether a civil proceeding is related to bankruptcy is whether the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy" (emphasis omitted)), *In re Pegasus Gold Corp.*, 394 F.3d 1189, 1193-94 (9th Cir. 2005) (adopting a more stringent test than applied in Pacor for a claim of the debtor that did not arise until after the confirmation of the bankruptcy plan).

Here, the Landowners' inverse condemnation suit falls squarely within the "first type of 'related to' proceeding" described in *Celotex*, 514 U.S. 307 n. 5, and is thus "related to" the bankruptcy within the meaning of § 1334(b) without further scrutiny. Similar to the claim before the court in Northern Pipeline, where the debtor filed a state action to recover contract damages to augment the debtor's estate, the debtors in this case seek to recover on state law inverse condemnation claims that are listed as property of the estate. *See Northern*

Pipeline, 458 U.S. at 55-56. The present suit is "related to" the bankruptcy because it is a part of the estate, and thus subject matter jurisdiction exists under § 1334(b).

C. Ripeness

"Ripeness is more than a mere procedural question; it is determinative of jurisdiction." *S. Pac. Transp. Co. v. City of Los Angeles*, 922 F.2d 498, 502 (9th Cir. 1990). Under the Supreme Court's decision in *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), an as-applied taking claim is ripe only if the landowner can establish that: (1) "the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue," and (2) the landowner has sought "compensation through the procedures the State has provided for doing so." *Id.* at 186, 194. We conclude that both of the Landowners' claims are ripe under this standard.

Application of the first requirement in Williamson County (the "finality" requirement) is dependent on the nature of the taking. *See Daniel v. County of Santa Barbara*, 288 F.3d 375, 382 (9th Cir. 2002). As we explain below, we follow the Nevada Supreme Court's characterization of Ordinance 1221 as an "unconditional and permanent" taking and a "physical occupation of private property" under the Nevada Constitution. *See Sisolak*, 137 P.3d at 1123. For such takings, the ripeness analysis of *Williamson County* applies in a modified form-the first requirement, that the government entity reach a final decision regarding the application of the regulations to the property at issue, is "automatically satisfied at the time of the physical taking" because "[w]here there has been a physical invasion, the taking occurs at once, and nothing the city can do or say after that point will change that fact." *Daniel*, 288 F.3d at 382 (9th Cir.2002) (quoting *Hall v. City of Santa Barbara*, 833 F.2d 1270, 1281 n. 28 (9th Cir. 1986) (overruled on other grounds by *Yee v. City of Escondido*, 503

U.S. 519 (1992))). Thus, as to Ordinance 1221, the ripeness doctrine does not require the Landowners to first seek and be denied a variance to satisfy the finality requirement.

Ordinance 1198 is not a physical taking, so we must apply an unmodified form of the *Williamson County* finality requirement. *Cf. Daniel*, 288 F.3d at 382. Clarifying the first prong of *Williamson County*, the Supreme Court held that "once it becomes clear that . . . the permissible uses of the property are known to a reasonable degree of certainty, a takings claim is likely to have ripened." *Palazzolo v. Rhode Island*, 533 U.S. 606, 620 (2001). Thus, in applying the finality requirement for ripeness, courts have imposed a "meaningful application requirement," which requires that "local decision-makers must be given an opportunity to review at least one reasonable development proposal before an as applied challenge to a land use regulation will be considered ripe." *S. Pac. Transp. Co.*, 922 F.2d at 503. This requirement applies "even in instances where a regulation appeared on its face to be highly restrictive." *Id.*

After reviewing the record, Judge Jones found that the Landowners met the meaningful application requirement. In particular, he noted:

> Examining the recent use applications involving the 1.25 acres reveals that Vacation Village has requested to use that land for activities ranging from hotel development to a temporary automobile sales show. Vacation Village received approval for all of these uses. However, the approvals provided that none of the proposed activities could occur on the 1.25 acres.

We do not find that Judge Jones clearly erred in making these findings of fact. Based on the reasonable plans for "hotel development" and "temporary automobile sales show" which were denied as to the 1.25 acres in the RPZ, along with the clearly enumerated uses for land in an RPZ in Ordinance

1198, the Landowners have satisfied the *Williamson County* finality requirement as to Ordinance 1198.

The second requirement of *Williamson County* is also referred to as the "exhaustion" prong. *Carson Harbor Village, Ltd. v. City of Carson*, 353 F.3d 824, 827 (9th Cir. 2004). In *Carson Harbor Village*, the property owner alleged that, as applied to its property, the city's ordinance enacting a ceiling on rent levels for mobile home spaces amounted to a regulatory taking. *Id.* at 825-26. Instead of pursuing California's procedures for seeking just compensation, however, the property owner filed a complaint in federal district court alleging a taking under 42 U.S.C. § 1983. *Id.* at 826. Applying the second prong of *Williamson County*, we dismissed the property owner's regulatory takings claim as unripe. *Id.* at 830.

Unlike the § 1983 claim in *Carson Harbor Village*, the Landowners' inverse condemnation claims meet the exhaustion prong of *Williamson County*. In Nevada, an acceptable state procedure for obtaining just compensation for a takings claim is the filing of an inverse condemnation lawsuit. *See, e.g., Sisolak*, 137 P.3d at 1116. The Landowners initially brought their state law inverse condemnation claims in state court. That the case is presently in federal court is a product of 28 U.S.C. § 1334(b), not a failure to meet the ripeness requirement of *Williamson County*; the nature of the Landowners' state law inverse condemnation claims are not changed by the exercise of federal subject matter jurisdiction. As the Landowners are currently pursuing their state law inverse condemnation action, we find that the exhaustion prong of *Williamson County* is met as to both claims.

Because the Landowners' claims satisfy both of *Williamson County's* requirements—finality and exhaustion—we hold that they are ripe for adjudication.

D. Compliance with State Appeal Procedures

The Landowners argue that we should dismiss the County's appeal because it did not comply with N.R.S. § 37.170(1) which requires that in a takings case a government agency must first deposit into court the full amount of the judgment before it may dispute a money judgment on appeal. *See State ex rel. Dep't of Highways v. 2d Jud. Dist. Ct.*, 337 P.2d 274, 276 (Nev. 1959). Federal Rule of Civil Procedure 62(d), however, requires only that the appellant post a supersedeas bond in order to obtain a stay on appeal. We apply the Federal Rule.

"[F]ederal courts are to apply state substantive law and federal procedural law." *Hanna v. Plumer*, 380 U.S. 460, 465 (1965). Thus, "[w]hen a situation is covered by one of the Federal Rules [of Civil Procedure] . . . the court has been instructed to apply the Federal Rule," even it "is in direct collision with the law of the relevant State." *Id.* at 471-72. Rule 62(d) "is a purely procedural mechanism to preserve the status quo during a stay pending appeal of a district court decision and creates no choice of law concerns." *Bass v. 1st Pac. Networks, Inc.*, 219 F.3d 1052, 1055 (9th Cir. 2000). The County's monetary obligations on appeal is a situation "covered by" Rule 62(d). We apply Rule 62(d) and find that the County properly complied by posting a supersedeas bond.

E. Dual Role of Judge Jones

A year after his confirmation to the United States District Court for the District of Nevada, Judge Jones issued Findings of Fact and Conclusions of Law, which he signed as a "United States Bankruptcy Judge." Soon thereafter, acting in his capacity as a district judge, Judge Jones entered an order sua sponte withdrawing the bankruptcy reference for reasons of judicial efficiency, and entered a final judgment. We hold that the unique procedural history of this case does not require reversal.

The County cites no authority for the proposition that Judge Jones's entering of findings of fact signed as a bankruptcy judge following his confirmation as an Article III judge constituted reversible error. In *Northern Pipeline*, on which the County's opening brief primarily relies, the Supreme Court was concerned with the opposite problem-the potential for a violation of the separation of powers doctrine when the "judicial Power of the United States" is bestowed on Article I bankruptcy judges, who lack the salary and tenure protections of Article III. 458 U.S. at 58-60. Judge Jones was an Article III judge, with all of the attendant benefits and protections when he entered his findings. Absent a reasoned argument for concern, we do not find that reversal is warranted on these facts.

Similarly, we do not find that Judge Jones's withdrawal of reference to the bankruptcy court was reversible error. Under 28 U.S.C. § 157(d), "[t]he district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion . . . for cause shown." In determining whether cause exists, we consider the following: "the efficient use of judicial resources, delay and costs to the parties, uniformity of bankruptcy administration, the prevention of forum shopping, and other related factors." *In re Cantor*, 299 F.3d 1150, 1154 (9th Cir. 2002) (quoting *Sec. Farms v. Int'l Bhd. of Teamsters, Chauffers, Warehousemen, & Helpers*, 124 F.3d 999, 1008 (9th Cir. 1997)). Judge Jones explained that "it is necessary and appropriate to withdraw the reference to the United States District Court of this adversary proceeding in order to allow the undersigned to file a final judgment." We find that Judge Jones efficiently used judicial resources and minimized further delay and costs to the parties by entering final judgment at the conclusion of protracted litigation. Thus, although there may have been some abrogation of the County's right to an intermediate appeal from the bankruptcy court's decision based on the precise timing of Judge Jones's withdrawal of the reference,

see, e.g., In re Pruitt, 910 F.2d 1160, 1168 (9th Cir. 2002), we find that an examination of all the factors identified in *In re Cantor*, 299 F.3d at 1154, indicates that Judge Jones properly withdrew the reference for cause.

IV. ORDINANCE 1221

Our review of the Landowners' claim that Ordinance 1221 effected a taking of airspace under the Nevada Constitution is limited by the Nevada Supreme Court's decision in *McCarran International Airport v. Sisolak*, 137 P.3d 1110, issued after the close of briefing in this appeal. Like the Landowners, Sisolak also owned property near McCarran Airport and brought an inverse condemnation action against the County alleging that the height restrictions in Ordinance 1221 constituted a per se regulatory taking under the Nevada Constitution. *Id.* at 1116. Citing the Nevada constitution and statutes, the Nevada Supreme Court first held that Sisolak had a valid property interest in the airspace above their land up to 500 feet. *Id.* at 1120. The court then reasoned:

> Although the airplanes flying over Sisolak's property are not constantly occupying the airspace in a temporal sense, the invasion is nevertheless permanent because the right to fly through the airspace is preserved by the Ordinances and expected to continue into the future. . . . Therefore, the Ordinances authorize a physical invasion of Sisolak's property and require Sisolak to acquiesce to a permanent physical invasion.

Id. at 1225. Based on its finding that Ordinance 1221 was a physical invasion of Sisolak's airspace, the Nevada Supreme Court concluded that "under both the United States and Nevada Constitutions, the facts of this case present a regulatory per se taking and that Sisolak is due just compensation for the government's physical invasion of his property." *Id.* at 1121. Given the similarities between *Sisolak* and the present

case, we first determine the proper weight to accord to the Nevada Supreme Court's decision in *Sisolak*.

As a general rule, "state law as announced by the highest court of the State is to be followed." *Comm'r v. Estate of Bosch*, 387 U.S. 456, 465 (1967) (citing *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938)). However, "interpretation of state statutes by state courts under compulsion of federal law erroneously understood does not bind federal courts." *Breisch v. Cent. R.R.*, 312 U.S. 484, 489 (1941).

We respectfully disagree with our colleagues on the Nevada Supreme Court concerning their interpretation of federal takings jurisprudence. No Fifth Amendment taking of the Landowners' property occurred under the standards set forth in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978).

The Landowners, however, raise inverse condemnation claims only under Article 1, Section 8(6) of the Nevada Constitution and under the circumstances of this case, the Nevada Supreme Court is the final arbiter of that fundamental state charter. Despite our disagreement with the Nevada Supreme Court's interpretation of federal takings cases, we cannot find that it felt compelled to interpret the Nevada Constitution in a particular manner based on those cases. *Cf. Delaware v. Prouse*, 440 U.S. 648, 651-53 (1979). The Nevada Supreme Court considered and rejected the argument that Sisolak's state constitution takings claim should be analyzed under *Penn Central*, noting that "a state may place stricter standards on its exercise of the takings power through its state constitution or state eminent domain statutes." 137 P.3d at 1126 (citing *Kelo v. City of New London*, 545 U.S. 469, 489 (2003)). In holding that Ordinance 1221 effected a taking, the majority in *Sisolak* cited to the Nevada Constitution and state statutes, as well as the decisions of other state supreme courts. *See, e.g.*, 137 P.3d at 1120, 1125. Jus-

tice Becker's dissent in *Sisolak* also confirms that the Nevada Supreme Court's decision was made on state grounds:

> I realize that the majority has determined to apply state constitutional principles to this takings analysis. This is certainly a reasonable approach. Having said this, I do not believe it necessary to deviate from federal takings jurisprudence to justly evaluate whether a compensable regulatory taking has occurred.

Id. at 1136 (Becker, J., dissenting). Thus, the Nevada Supreme Court clearly found that the Nevada Constitution defines takings more broadly than the United States Constitution and that Ordinance 1221 is a per se regulatory taking under the Nevada Constitution.[4]

We further find that we are bound by the Nevada Supreme Court's decision in *Sisolak* when reviewing Ordinance 1221 under the Nevada Constitution despite the existence of federal aviation regulations. Applying the Supreme Court's decision in *Jankovich v. Indiana Toll Road Comm'n*, 379 U.S. 487, 493-94 (1965), we hold that federal airport regulations do not preempt *Sisolak's* application of the Nevada Constitution's takings clause with respect to Ordinance 1221.

In *Jankovich*, the operators of the Gary Municipal Airport filed a complaint in Indiana state court alleging violations of

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[4] *Sisolak*, does not, however control the outcome of this case under principles of collateral estoppel. As a rule we "give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered." *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 81 (1984). Because Nevada courts have not applied offensive nonmutual collateral estoppel against a state party on a question of law, we do not apply it here. *See Coeur D'Alene Tribe v. Hammond*, 384 F.3d 674, 689 (9th Cir. 2004) ("[w]e hesitate to give preclusive effect to the previous litigation of a question of law by estoppel against a state party when no state law precedent compels that we do so"); Restatement (Second) of Judgments § 29 (1982).

the city's airport zoning ordinance which set height limitations for structures in the immediate vicinity of the airport. *Id.* at 488. The Indiana Supreme Court invalidated the ordinance, holding that such a restriction "purported to authorize an unlawful and unconstitutional appropriation of property rights without payment of compensation." *Id.* The Supreme Court initially granted review of the Indiana Supreme Court's decision and then dismissed the writ of certiorari as improvedently granted, reasoning that it did not have jurisdiction over a decision of the Indiana Supreme Court made on independent and adequate state grounds. *Id.* at 489.

Relevant to the present case, the petitioners in *Jankovich* contended that the Indiana Supreme Court's "state ground of decision is not adequate because it is inconsistent with the policy of the Federal Airport Act . . . and therefore founders on the Supremacy Clause." *Id.* at 492. The Supreme Court rejected this argument, noting that the decision of the Indiana Supreme Court "certainly does not portend the wholesale invalidation of all airport zoning laws," *id.* at 493, and the Indiana Supreme Court's decision that the city's ordinance was invalid as a taking was "compatible with the congressional policy embodied in the Federal Airport Act." *Id.* at 495.

The County cites no subsequent Supreme Court authority which would call the holding of *Jankovich* into question. As the Supreme Court has already spoken on a substantially similar issue, we likewise hold that the Supremacy Clause does not invalidate the decision of the Nevada Supreme Court finding that height restrictions in airport zoning ordinances amount to a taking of the underlying property requiring compensation under the Nevada Constitution.

We now turn to the County's challenges specific to Ordinance 1221.

A. Constitutional Estoppel

The County also argues that the Landowners are constitutionally estopped from claiming a taking of their airspace. Based on the Nevada Supreme Court's decision in *City of Las Vegas Downtown Redevelopment Agency v. Pappas*, 76 P.3d 1 (Nev. 2003), we find that the Nevada Supreme Court would not find that the Landowners have waived their claims under the Nevada Constitution.

In *Pappas*, the Nevada Supreme Court declined to apply the doctrine of constitutional waiver, but held that the doctrine would apply to all eminent domain cases filed in the *future* (post-2003). *Id.* at 9. We believe that the Nevada Supreme Court would find that the holding of *Pappas* pertains to the present case because "[i]nverse condemnation proceedings are the constitutional equivalent to eminent domain actions and are governed by the same rules and principles that are applied to formal condemnation proceedings." *County of Clark v. Alper*, 685 P.2d 943, 949 (Nev. 1984). The Landowners filed their inverse condemnation complaint in 1993, ten years before the *Pappas* ruling. Thus under *Pappas*, the Landowners' claims are not constitutionally estopped.

B. Waiver by Easement

The County argues that by granting it perpetual avigation easements, the Landowners effectively transferred their property interest in the airspace and, therefore, cannot now bring a claim alleging a taking of that airspace. This argument also fails under *Sisolak*.

The interpretation of the language of an easement is a matter of state law. See *S.O.C., Inc. v. Mirage Casino-Hotel*, 23 P.3d 243, 246 (Nev. 2001). This court is bound by the Nevada Supreme Court's interpretation of the perpetual avigation easement involved in *Sisolak*, insofar as it does not conflict with federal law, because the avigation easement

language at issue in this case is identical to the language considered in *Sisolak*. *See Sisolak*, 137 P.3d at 1115-16.

The *Sisolak* court explained that "an easement obtained by a government entity for public use is only as broad as necessary for the accomplishment of the public purpose for which the easement was obtained." *Id.* at 1120 (quoting *S.O.C., Inc.*, 23 P.3d at 247). Noting that the avigation easement did "not contain any height restriction terms," the court held that the easement "did not abrogate Sisolak's property interest in the airspace or serve as a defense to the inverse condemnation claim." *Id.* Under Nevada law, the agreement was nothing more than an "overflight easement exacted . . . to preclude liability for aircraft noise." *Id.* at 1120-21. Following Sisolak, we hold that the avigation easements are not a defense to the taking of the Landowners' airspace.

C. Just Compensation for Airspace

The district court's conclusion that the taking of airspace by Ordinance 1221 was capped at the heights provided in Ordinance 728 was predicated on its erroneous interpretation—in light of *Sisolak*—of an avigation easement as waiving or conveying the Landowners' property interests for the airspace above a 20:1 approach path extending from the end of the runway. As discussed above, *Sisolak* holds that Nevadans have a property interest "in the usable airspace above [their] property up to 500 feet" notwithstanding the avigation easements granted. *Sisolak*, 137 P .3d at 1120. We thus remand to the district court for a determination of just compensation following *Sisolak*.

To determine just compensation for a taking of airspace by Ordinance 1221, *Sisolak* instructs:

> Constitutional principles provide that just compensation is measured by the fair market value of the condemned property. [T]he market value of the property should be

> determined by reference to the highest and best use for which the land is available and for which it is plainly adaptable. However, the highest and best use must be "reasonably probable." In determining fair market value, the trier of fact may consider any elements that fairly enter into the question of value which a reasonable businessman would consider when purchasing.

Id. at 1128 (internal quotation marks and citations omitted). On remand, the district court "should give 'due consideration . . . to those zoning ordinances that would be taken into account by a prudent and willing buyer.'" *City of Las Vegas v. Bustos*, 75 P.3d 351, 352 (Nev. 2003) (per curiam) (quoting *Clark County v. Alper*, 685 P.2d 943, 948 (1984) (ellipses in *Bustos*)).[5]

V. ORDINANCE 1198

Under *Sisolak*, Ordinance 1198 does not effect a regulatory per se taking under the Nevada Constitution of the separate parcel consisting of 1.25 acres. Outside the "two relatively narrow categories" of regulatory per se takings-where the regulation (1) requires an owner to suffer a permanent physical invasion of her property or (2) completely deprives an owner of all economical beneficial use of her property—"regulatory takings challenges are governed by the standards set forth in *Penn Central*." *Sisolak*, 137 P.3d at 1122 (quoting *Goldblatt v. Hempstead*, 369 U.S. 590, 594 (1962)). The

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[5] For example, the Nevada Supreme Court has "permitted the trier of fact to consider the effect that future zoning or variances may have on the condemned property's highest and best use when there is evidence that a prudent purchaser would conclude that he or she would likely receive a zoning change." *City of N. Las Vegas v. Robinson*, 134 P.2d 705, 708 (Nev. 2006). *See also Sisolak*, 137 P.3d at 1128 ("Although evidence regarding variance procedures is irrelevant to establish whether a property owner is entitled to compensation for a regulatory per se taking, such evidence is still relevant in calculating the amount of compensation due.").

Landowners do not set forth a claim that Ordinance 1198 amounts to a regulatory per se taking because they do not allege that the designation of the 1.25 acres in question as within the RPZ constitutes either a permanent physical invasion or a complete deprivation of all economically beneficial use of that property.

When presented with a regulatory taking that is not a per se taking, the Nevada Supreme Court instructs that "[a] court should consider (1) the regulation's economic impact on the property owner, (2) the regulation's interference with investment-backed expectations, and (3) the character of the government action." *Sisolak*, 137 P.3d at 1122 (quoting *Penn Central*, 438 U.S. at 124).

In this case, Judge Jones evaluated the facts presented and properly applied the *Penn Central* test to the Landowners' inverse condemnation claim as it relates to Ordinance 1198. In particular, Judge Jones found that (1) the economic impact on the Landowners was minimal because the property in the RPZ accounted for only 5% of the Landowners' property, and that that small portion "could still be put to use as a water feature, as some form of landscaping, or possibly as a parking lot," (2) interference with reasonable investment backed expectations was also minimal because the regulation furthers an important public policy of airline safety and because the initial development of the airport predated the acquisition of the Vacation Village property, and (3) the character of the government action favors the County because airport zoning benefits the public as a whole. These factual findings are not clearly erroneous. Accordingly, we affirm Judge Jones's determination that Ordinance 1198 as applied to 1.25 acres of the Landowners' land designated as within the RPZ was not a taking.

VI. CONCLUSION

Following *Sisolak*, and in the absence of federal pre-emption, we have no choice but to find that Ordinance 1221, as applied to the Landowners' property, amounted to a regulatory per se taking under the Nevada Constitution. We remand the district court's award of just compensation for reconsideration in light of *Sisolak*.

We affirm the district court's decision that Ordinance 1198, as applied to the small parcel that is part of the Landowners' property, did not amount to a taking.

The parties shall each bear their own costs on appeal.

AFFIRMED IN PART and REMANDED.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

[Filed July 7, 2005]

Case No. CV-S-05-0011-RCJ-RJJ
Reference withdrawn from:
BK-S-97-27654-RCJ
Adv. No. 98-2313-RCJ

In Re: CEH PROPERTIES, LTD.,
Debtor.

VACATION VILLAGE, INC. d/b/a VACATION VILLAGE HOTEL & CASINO, *et al*,
Plaintiffs,

vs.

CLARK COUNTY, NEVADA, a public entity organized and existing under the laws of the State of Nevada, *et al.*,
Defendants.

Date of Hearing: N/A
Time of Hearing: N/A

AMENDED FINAL JUDGMENT AND ORDER IN CONDEMNATION

The bench trial in this action commenced on April 3, 2002. On December 30, 2005 the Court issued its findings of fact and conclusions of law ordering that Plaintiff Vacation Village, Inc., which reference is hereby corrected to CEH Properties, Ltd. ("CEH"), be awarded compensation by Defendant Clark County, Nevada ("Clark County"), for the taking of airspace between the 20:1 approach granted in the 1988 avi-

gation easement and the lower 50:1 precision instrument approach path instituted after the airport expansion. The Court further ordered that CEH be awarded compensation by Clark County for the taking of the ground easement. The Court further ordered that Clark County did not take CEH's 1.25 acres in the runway protection zone.

On February 7, 2005, the Court further ordered that CEH's property had a before condition value of $10.00 per square foot and after condition value of $5.50. Therefore, the total value of the airspace taken would be the difference ($4.50 per square foot) times the total square footage of the property, 1,085,-951.00, or $4,886,779.50. The Court further ordered that the ground easement is to be valued at 30% of the total square footage for the easement (95,927 square feet) valued at $10.00 per square foot or $287,781.00. The total value of the take being $5,174,560.50 ($4,886,779.50 1 + $287,781.00).

On April 18, 2005, the parties presented, by briefing and argument, certain issues to this Court for determination. After considering the foregoing and for good cause appearing, the Court rules as follows:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT:

1. A final judgment and order in condemnation for the taking of the airspace and ground easement that were the subject of this litigation shall be and is hereby entered under CEH's five causes of action in its Second Amended Complaint. All claims by the other Plaintiffs are dismissed. The final judgment in inverse condemnation for just compensation is entered against Clark County in favor of CEH. The airspace taken by inverse condemnation is between the 20:1 approach and the lower 50:1 precision instrument approach path instituted after the airport expansion, over the property formerly referred to as Vacation Village Hotel and Casino, Assessors Parcel Number 177-05-602-001, and the ground

easement recorded as document number 891120:00778, and more particularly described in Exhibit "1", are hereby taken by inverse condemnation by Clark County.

2. CEH is entitled, to just compensation for the taking of said airspace by inverse condemnation in the amount of $4,886,779.50.

3. CEH is entitled to just compensation for the taking of said ground easement by inverse condemnation in the amount of $287,781.00.

4. CEH is entitled to prejudgment interest on the amount ordered in the final judgment and order of condemnation for both the airspace and the ground easement, from December 17, 1993, until final judgment and order of condemnation is entered on the total amount of $5,174,560.50. Interest will be calculated based on the statutory interest rate set forth in NRS 37.175, which is a rate equal to the prime rate at the largest bank in Nevada as ascertained by the commissioner of financial institutions on January 1 or July 1, as the case may be, immediately preceding the date of judgment plus 2 percent. The rate must be adjusted accordingly on each January 1 and July 1 thereafter until the judgment is satisfied. As of June 17, 2005, CEH is entitled to prejudgment interest commending December 17, 1993, in the amount of $4,314,803.73, and accruing thereafter at a rate of $1,027.82 per day, until the rate is adjusted on July 1, 2005 and every January 1 or July 1 thereafter until the judgment is paid in full, pursuant to NRS 37.175.

5. CEH is entitled to $7,322.40 in costs in this case.

6. CEH is entitled to appraiser's fees for Charles H. Jack, IV, in the amount of $25,000.00.

7. CEH is entitled to attorney's fees in the amount of $600,000.00.

8. As of June 17, 2005, the total final judgment including all costs, appraiser fees, attorney's fees and pre-judgment interest is $10,121,686.63.

9. Post-judgment interest shall accrue on all unpaid amounts for the takings, costs, appraiser's fees and attorney's fees at the statutory rate set forth in NRS 37.175.

10. Clark County must pay the total amount to be due within thirty (30) days of the entry of this Final Judgment and Order of Condemnation by depositing said amount with the Clerk of the Court or by posting a cash bond in the amount of 110% of the total judgment or by posting a supersedeas bond in the amount of 120% of the total judgment or by posting a supersedeas bond in the amount of 120% of that part of the final judgment that Clark County intends to challenge on appeal.

11. Within 30 days after the final judgment is entered, Clark County may elect to pay to CEH the sum of $287,781.00, the amount determined to be the value of the ground easement, plus all accrued pre-judgment interest in the amount of $240,709.10 through June 17, 2005, totaling $528,490.10 plus additional interest accruing at $57.16 per day through June 30, 2005, until paid in full, and adjusted thereafter to the statutory rate as of July 1, 2005 and upon payment to the Clerk of the Court, title will vest ownership of the ground easement, identified in Exhibit "1," in Clark County.

12. If Clark County elects to pay for the ground easement as set forth in Paragraph 8, the remaining final judgment will be $9,593,939.64 as of June 17, 2005, with interest accruing on the principal value of the airspace at the rate of $1,027.82 per day until the bond is posted. To stay execution of the remaining final judgment pending appeal, Clark County will be required to post a cash bond in the amount of 110% of the remaining final judgment or a supersedeas bond in the amount of 120% of the remaining judgment.

13. Upon the entry of final judgment and order of condemnation, and pending an appeal by either party, Clark County may continue in possession and use of the property during the pendency of and until the final conclusion of this litigation and any appeal. Clark County shall not be deemed to have abandoned or waived its right to appeal from the final judgment and order of condemnation by paying into this court the amount of this final judgment or by filing a cash or supersedeas bond with the Clerk of the Court in an amount set forth by the Court.

14. The Parties having reviewed this final judgment and order of condemnation do not waive their respective rights on appeal as to any issue that may have arisen during this litigation.

IT IS SO ORDERED this 7th day of July, 2005.

/s/ Robert C. Jones
UNITED STATES DISTRICT COURT JUDGE

Reviewed by:

JOHN PETER LEE, LTD.
/s/ John Peter Lee
JOHN PETER LEE, ESQ.
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830 Las Vegas Blvd. So.
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Reviewed by

JONES. VARGAS
/s/ R. Douglas Kurdzeil
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Attorney for Clark County

Attorneys for: CEH Properties, Ltd;
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Cathleen Heers Norcott; Gary R. Heers; and Cheryl D. Nolte

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

[Filed JUN. 17, 2005]

Case No. CV-S-05-0010-RCJ-RJJ

In re: CEH PROPERTIES, LTD.,
Debtor.

VACATION VILLAGE, INC. d/b/a
VACATION VILLAGE HOTEL & CASINO, *et al.*,
Plaintiffs,

vs.

CLARK COUNTY, NEVADA, a public entity organized and existing under the laws of the State of Nevada, *et al.*,
Defendants.

FINAL JUDGMENT AND ORDER IN CONDEMNATION

The bench trial in this action commenced on April 3, 2002. On December 30, 2005, the court issued its findings of fact and conclusions of law ordering that Plaintiff Vacation Village, Inc., which reference is hereby corrected to CEH Properties, Ltd. ("CEH"), be awarded compensation by Defendant Clark County, Nevada ("Clark County"), for the taking of airspace between the 20:1 approach granted in the 1988 avigation easement and the lower 50:1 precision instrument approach path instituted after the airport expansion. The court further ordered that CEH be awarded compensation by Clark County for the taking of the ground easement. The court further ordered that Clark County did not take CEH's 1.25 acres in the runway protection zone.

On February 7, 2005, the court further ordered that CEH's property had a before condition value of $10.00 per square foot and after condition value of $5.50. Therefore, the total value of the airspace taken would be the difference ($4.50 per square foot) times the total square footage of the property, 1,085,951.00, or $4,886,779.50. The court further ordered that the ground easement is to be valued at 30% of the total square footage for the easement (95,927 square feet) valued at $10.00 per square foot or $287,781.00. The total value of the take being $5,174,560.50 ($4,886,779.50 + $287,781.00).

On April 18, 2005, the parties presented, by briefing and argument, certain issues to this court for determination. After considering the foregoing and for good cause appearing, the court rules as follows:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT:

1. A final judgment and order in condemnation for the taking of the airspace and ground easement that were the subject of this litigation shall be and is hereby entered under CEH's five causes of action in its Second Amended Complaint. All claims by the other Plaintiffs are dismissed. The final judgment in inverse condemnation for just compensation is entered against Clark County and in favor of CEH. The airspace taken by inverse condemnation is between the 20:1 approach and the lower 50:1 precision instrument approach path instituted after the airport expansion, over the property formerly referred to as Vacation Village Hotel and Casino, Assessors Parcel Number 177-05-602-001 and the ground easement recorded as document number 891120:00778, and more particularly described in Exhibit 1, are hereby taken by inverse condemnation by Clark County.

2. CEH is entitled to just compensation for the taking of said airspace by inverse condemnation in the amount of $4,886,779.50.

3. CEH is entitled to just compensation for the taking of said ground casement by inverse condemnation in the amount of $287,781.00.

4. CEH is entitled to prejudgment interest on the amount ordered in the final judgment and order of condemnation for both the airspace and the ground easement, from December 17, 1993, until final judgment and order of condemnation is entered on the total amount of $5,174,560.50. Interest will be calculated based on the statutory interest rate set forth in NRS 37.175, which is a rate equal to the prime rate at the largest bank in Nevada as ascertained by the commissioner of financial institutions on January 1 or July 1, as the case may be, immediately preceding the date of judgment, plus 2 percent. The rate must be adjusted accordingly on each January 1 and July 1 thereafter until the judgment is satisfied. As of June 17, 2005, CEH is entitled to prejudgment interest commencing December 17, 1993, in the amount of $4,314,803.73, and accruing thereafter at a rate of $1,027.82 per day, until the rate is adjusted on July 1, 2005 and every January 1 or July 1 thereafter until the judgment is paid in full, pursuant to NRS 37.175.

5. CEH is entitled to $7,322.40 in costs in this case.

6. CEH is entitled to appraiser's fees for Charles H. Jack, IV, in the amount of $25,000.

7. CEH is entitled to attorney's fees in the amount of $600,000.00.

8. As of June 17, 2005, the total final judgment including all costs, appraiser fees, attorney's fees and prejudgment interest is $10,121,686.63.

9. Post-judgment interest shall accrue on all unpaid amounts for the takings, costs, appraiser's fees and attorney's fees at the statutory rate set forth in NRS 37.175.

10. Clark County must pay the total amount to be due within thirty (30) days of the entry of this Final Judgment and Order of Condemnation by depositing said amount with the Clerk of the Court or by posting a cash bond in the amount of 110% of the total judgment or by posting a supersedeas bond in the amount of 120% of the total judgment or by posting a supersedeas bond in the amount of 120% of that part of the final judgment that Clark County intends to challenge on appeal.

11. Within 30 days after the final judgment is entered, Clark County may elect to pay to CEH the sum of $287,781.00, the amount determined to be the value of the ground easement, plus all accrued pre-judgment interest in the amount of $240,709.10 through June 17, 2005, totaling $528,490.10 plus additional interest accruing at $57.16 per day through June 30, 2005, until paid in full, and adjusted thereafter to the statutory rate as of July 1, 2005, and upon payment to the Clerk of the Court, title will vest ownership of the ground easement, identified in Exhibit 1, in Clark County.

12. If Clark County elects to pay for the ground easement as set forth in Paragraph 8, The remaining final judgment will be $9,593,939.64 as of June 17, 2005, with interest accruing on the principal value of the airspace at the rate of $1,027,82 per day until the bond is posted. To stay execution of the remaining final judgment pending appeal, Clark County will be required to post a cash bond in the amount of 110% of the remaining final judgment or a supersedeas bond in the amount of 120% of the remaining judgment.

13. Upon the entry of the final judgment and order of condemnation, and pending an appeal by either party, Clark County may continue in possession and use of the property during the pendency of and until the final conclusion of this litigation and any appeal. Clark County shall not be deemed to have abandoned or waived its right to appeal from the final judgment and order of condemnation by paying into this court

the amount of this final judgment or by filing a cash or supersedeas bond with the Clerk of the Court in an amount set forth by the court.

14. The Parties having reviewed this final judgment and order of condemnation do not waive their respective rights on appeal as to any issue that may have arisen during this litigation.

DATED: June 17, 2005

/s/ Robert C. Jones
UNITED STATES DISTRICT COURT JUDGE

APPENDIX D

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA

[Filed DEC. 30, 2004]

BK-S-97-27654-RCJ
Chapter 11
Adversary No. 98-2313-RCJ

In re: CEH PROPERTIES, LTD,

Debtor.

VACATION VILLAGE, INC. d/b/a VACATION VILLAGE HOTEL & CASINO, *et al.*,

Plaintiffs,

CLARK COUNTY, NEVADA, a public entity organized and existing under the laws of the State of Nevada, *et al.*,

Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Date:
Time:

Plaintiff, Vacation Village, Inc., (hereinafter "Vacation Village") is a casino and hotel located along Las Vegas Boulevard South, a portion of which is commonly referred to as the Las Vegas "Strip." The property is also located approximately 2,600 feet from the end of two of McCarran International Airport's (hereinafter "airport") large aircraft runways. Vacation Village brought suit against Defendant, Clark County, Nevada, (hereinafter "County") for damages arising from the 1) inverse condemnation of airspace, 2) inverse condemnation of 1.25 acres, and 3) inverse

condemnation of easements.[1] This suit was originally brought in the District Court for Clark County. The case was removed to this Court, as a non-core adversary proceeding, after the Vacation Village property owner filed for bankruptcy. The Court having received oral and documentary evidence introduced by the parties at trial, and having duly considered said evidence and the points of law and authorities cited in the trial briefs of the parties, now finds for the reasons hereinafter set forth that the County is liable for the inverse condemnation of airspace and for the inverse condemnation of easements.

The following constitutes the Court's findings of fact and conclusions of law. To the extent certain findings may be deemed conclusions of law, they shall also be considered conclusions of law. Similarly, to the extent matters contained in the conclusions of law may be deemed findings of fact, they shall also be considered findings of fact.

I. FINDINGS OF FACT

In 1964, the Vacation Village property was purchased by Twin Lake Village, Inc. (hereinafter "Twin Lake"), the principals of which were Carol Heers and his brother Charles Heers. Twin Lake had assembled a 59 plus acre parcel of land located along the west side of Las Vegas Boulevard South. The Vacation Village property made up the northern portion of this parcel. Twin Lake transferred ownership of the parcel to the Heers brothers as individuals in 1971.

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[1] Plaintiffs amended their initial Complaint twice, reducing the causes of action from eleven to five. Plaintiffs' Second Amended Complaint included a cause of action for pre-condemnation damages along with the claims for inverse condemnation. However, in oral arguments Plaintiffs' counsel stated they were not seeking damages for the loss of business or having to lower the building plans and get air conditioners from Israel. Therefore, the Court does not address the fifth cause of action in Plaintiffs' Second Amended Complaint.

In 1973, as a result of litigation in a bankruptcy proceeding, the southern 34.40 acres of the parcel were transferred to Transamerica Corporation, and Carol Heers retained ownership of the northern 24.90 acres, along with a 30-foot easement across the Transamerica property. In 1988 Carol Heers, his wife, their children, and grandchildren created CEH Properties, Ltd., which became the owner of the 24.90 acres, the 30-foot easement, and Vacation Village Hotel and Casino.

The following year, in 1989, Transamerica granted CEH a second 40-foot easement across its property for purposes of ingress and egress. The 30-foot and 40-foot easements (hereinafter "access easements") were obtained in order to provide an access to the western end of the property, separate and removed from the public entrance to Vacation Village.

A. The Avigation Easements

When the parcel was transferred from Twin Lake to the Heers brothers, in 1971, approximately 30 acres were zoned as H-1 (Limited Resort and Apartment) and 20 acres were zoned as RE (Rural Estates Residential). Because the County limited Twin Lake's original request to build a four-story casino to two-stories, the Heers brothers, in 1971, sought approval from the County to rezone the 20 acres classified as RE to H-1. This was done so that they could expand horizontally, instead of vertically. The County partially conditioned approval of the rezoning request upon the Heers brothers granting an avigation easement to it.

In August 1971, the Heers brothers granted the County an avigation easement and the County signed a Resolution of Intent to Reclassify Real Property, which provided that the rezoning of the 20 acres would be consummated upon the completion of the proposed building. The avigation easement granted the County "a perpetual right of flight, ingress to and egress from the airspace over the lands," and the Heers

brothers further agreed to release and hold harmless the Defendant for losses caused by "noise or the psychological effect of aircraft." (Defs.' Ex. O). In 1974, the Heers brothers had completed 344 rooms and applied to the County for their fourth extension of time. However, their request for an extension of time was denied and the easement was never recorded.

Shortly thereafter, the Heers brothers sought approval to continue construction on the portion of the property already zoned H-1. The application was granted subject to various conditions. Subsequently, the Heers brothers experienced financial hardship and declared bankruptcy. It was at this time that the parcel was split between Transamerica and Carol Heers.

In 1988, CEH, which took over Carol Heers's interest in the property and Vacation Village, again applied to the County to have the RE portion of the property rezoned to H-1. As envisioned by CEH, the Vacation Village project would be located approximately 2,600 ft southwest of the approach for runway 1R and would consist of one 80 foot above ground level sign, one 47 foot above ground level casino, five 28 foot above ground level hotel buildings, and three 76 foot above ground level hotel buildings. Once again, approval was partially conditioned on CEH granting the County an avigation easement. In June 1988, CEH granted the County the right

> to have perpetual right of flight, for the passage of aircraft in the air space above the surface of said premises, together with the right to cause in said air space such noise as may be inherent in the operation of aircraft, now known or hereafter used for navigation of or flight in the air using said air space or landing at, or taking-off from or operating at, or on the premises known as McCarran International Airport, Nellis Air Force Base, North Las Vegas Airport, Overton Airport

> and Indian Springs Air Force Base, Sky Harbor Airport, Laughlin/Bullhead Airport.[2]

(Defs.' Ex. AE). On June 8, 1988, the County approved a zone change from RE to H-1 and a use permit to construct and maintain a 501 room, two-story hotel, and an 85,000 square foot casino.

B. The Airport Expansion

Subsequent to the granting of the 1988 avigation easement, the County and McCarren International Airport began planning to expand the airport to handle an increase in the arrivals and departures of large aircraft. At this time, there existed two runways running northeast and southwest, 1L-19R and 1R-19L. Runway 1L-19R, while in existence, was not capable of handling large aircraft, and Runway 1R-19L, while capable of handling the larger aircraft was not a precision instrument approach runway. As a result of the airport expansion, Runway 1L-19R was removed and a larger runway, with the same designation, was constructed in its place. Runway 1R-19L was modified to allow for a precision instrument approach, which resulted in a lower 50:1 approach path for the runway instead of the previous 20:1 approach path. Because of these improvements, there was an increase in the flights of large aircraft, such as the Boeing 727, Boeing 747, Boeing 757, and McDonald Douglas MD-80, directly over the property. As the County stated at trial, there was also an accompanying decrease in the altitude at which these aircraft were flying while crossing over the property.

C. The Continued Property Development

In planning for the expansion and modification of the airport, the County anticipated that the surrounding properties

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[2] Most, if not all, of the people who sought approval from the County to build on their ground, or to change zoning designations, were required to sign these same generic avigation easements.

would be affected. In response, the County approved the appraisal of what it thought would be the impacted properties, which included Vacation Village. It was also at this time that discussions began to take place between Vacation Village and the airport about reducing the height of the hotel and casino in order to better accommodate the lower approach path over the property. Vacation Village provided revised elevation plans and agreed to redesign and lower the height of the hotel and casino to 42 feet.

Then, in 1990, the Federal Aviation Administration (FAA) issued two hazard determinations for the proposed Vacation Village project. The FAA found that portions of the project penetrated the lowered approach path for runway 1R. Specifically, the sign penetrated the surface by 53.4 feet, the casino by 8.4 feet, and the hotel buildings by 40 feet. In response to continuing concern over the height of the hotel and casino, Vacation Village once again agreed to further reduce the hotel and casino height to 38 feet, and the FAA approved construction at that height.

In March 1990, the County notified Vacation Village that it had decided to have the property appraised for condemnation. This decision was based not only on the property's relation to the runways but also because the County was considering using the property as a southern surface access from I-15 to the airport. However, in August 1990 Vacation Village was informed that the property would not be condemned since it was going to be outside of the corridor for the 1-15 airport connector project.

D. The Access Easements

Although the County decided not to condemn the Vacation Village property, it did decide to acquire the 30 acres owned by Transamerica, located just south of Vacation Village. At the time, the Transamerica property was still subject to two easements held by CEH. The first was the 30-foot easement

retained by Carol Heers when the 30 acres were transferred to Transamerica, and the second was a 40-foot easement transferred from Transamerica in 1989.

E. The Zoning of the Property

At all times since Twin Lake purchased the Vacation Village property in 1964, there have been various zoning ordinances in place regulating the use of airspace and land surrounding the airport. Consequently, a more detailed discussion of these ordinances is necessary to illustrate their impact on the property.

As early as 1946, the County enacted Ordinance 61, known as the "Land Use Ordinance of Clark, County Nevada." Since that time, various ordinances modifying the Clark County Code have been passed as the zoning needs surrounding the airport have changed. Ordinance 728, passed in 1981, adopted a new § 29.50 of the Clark County Code in order to limit the height of objects around public use airports. Under this ordinance, structures on the Vacation Village property were restricted to heights varying from 74 feet to 104 feet, depending upon their location on the property. Then in 1990, Ordinance 1221 further amended § 29.50 by adopting new zoning maps and height restrictions. The passing of this ordinance resulted in a decrease in the maximum building heights for Vacation Village. Under 1221, structures were restricted to heights varying from 5 feet to 25 feet. Section 29.50.30 of the Clark County Code further set forth that "nothing in this chapter shall be construed as prohibiting the construction or maintenance of any structure to a height up to thirty-five feet above the surface of the land in any zone created by this chapter."

Because of Vacation Village's proximity to the airport, it has also been subject to regulations delineating land use. In 1990, Ordinance 1198 was passed, which amended Title 29 by adopting an amended and revised Airport Environs

Overlay District. The new Overlay District was set forth in § 29.51 of the Clark County Code and described 1.25 acres of Vacation Village as a runway protection zone (hereinafter "RPZ"). This description limited the development of the 1.25 acres to uses such as a parking lot, a water area, or landscaping.

II. CONCLUSIONS OF LAW

As previously mentioned, Vacation Village has alleged inverse condemnation of airspace, inverse condemnation of 1.25 acres of real property, and inverse condemnation of the two access easements.

A. Inverse Condemnation of Airspace

In response to Vacation Village's claim of inverse condemnation of airspace, the County raises several defenses. First, the County asserts that Vacation Village has no property interest in the airspace above its land, and, therefore, there can be no taking. Second, the County alleges that even if Vacation Village does have a property interest in the airspace, it conveyed that interest to the County in the 1971 and 1988 avigation easements. Finally, the County argues that even if Vacation Village does have a property interest in the airspace and the avigation easements did not convey that interest to the County, Vacation Village still fails to demonstrate that a compensable taking has occurred.

1. Airspace as a Property Right

Defendant relies upon 49 U.S.C. §§ 40101-40104 to claim that Vacation Village has no property interest in the airspace above it. Under these statutes, the "United States Government has exclusive sovereignty of airspace." 49 U.S.C. § 40103(a)(1). With that sovereignty, the United States Government has reserved for the citizens a right of transit through the navigable airspace, which includes the airspace necessary

to "ensure the safety in the takeoff and landing of aircraft." 49 U.S.C. § 40102(a)(30).

Defendant also relies upon N.R.S. §§ 493.010-493.120 for the same proposition. The Nevada Legislature has described the lawfulness of flight over the lands and waters of Nevada as follows:

> 1. Flight in aircraft over the lands and waters of this state is lawful:
>
> a. Unless at such a low altitude as to interfere with the then existing use to which the land or water, or space over the land or water, is put by the owner.
>
> b. Unless so conducted as to be imminently dangerous to, persons or property lawfully on the land or water beneath.

N.R.S. § 493.050.

Nevada intended that its aeronautical statutes be compatible with those of the federal government. Nevada Revised Statutes § 493.120, Uniformity of Interpretation, sets forth that

> NRS 493.010 to 493.120, inclusive, shall be so interpreted and construed as to effectuate their general purpose to make uniform the law of those states which enact them, and to harmonize, as far as possible, with federal laws and regulations on the subject of aeronautics.

It is therefore appropriate and "necessary to read these statutes in conjunction with the enactments of the United State Congress under the commerce clause of the United States Constitution, as interpreted by the Supreme Court of the United States." *Roark v. Caldwell*, 394 P.2d 641, 643 (Idaho 1964) (interpreting the Idaho aeronautics statute, which contains language similar to that used in the Nevada statute).

The old common law recognized that land ownership extended to the heavens. *United States v. Causby*, 328 U.S.

256, 260 (1946). With the advent of flight, successive authorized agencies limited this notion to specified heights, thereby creating "navigable airspace," so as to preserve the air as a public highway, free from countless trespass suits. *Id.* at 261. The statutes cited by the County are some of the more recent limitations placed upon, and redefining, this ancient doctrine.

However, the concept of navigable airspace is not without its own constraints. After all, "the use of land presupposes the use of some of the airspace above it. Otherwise no home could be built, no tree planted, no fence constructed, no chimney erected." *Griggs v. Allegheny County*, 369 U.S. 84, 89 (1962) (quoting *Causby*, 328 U.S at 264). Courts have recognized that "[t]he landowner owns at least, as much of the space above the ground as [he] can occupy or use in connection with the land. The fact that he does not occupy it in a physical sense—by the erection of buildings and the like—is not material" *Causby*, 328 U.S. at 264. Accordingly, the courts in interpreting and applying these statutes have routinely held that arrivals and departures of aircraft that occur below 500 ft and that qualify as invasions of property, under a three-part test laid out in *Causby*, are takings. *See Griggs v. Allegheny*, 369 U.S. 84 (1962); *Matson v. United States*, 171 F.Supp. 283 (Ct. Cl. 1959) (holding that continuous invasions of aircraft flying below 500 ft constituted a taking); *Aaron v. United States*, 311 F.2d 798 (Ct.C1.963) (distinguishing between claims that occurred below 500 ft and those that were above 500 ft.); *Hodges Indus., Inc. v. United States*, 355 F.2d 592 (Ct. Cl. 1966) (holding that those flights constituting a dire, immediate, and substantial interference below 500 ft were a taking). Thus, Vacation Village does retain a property interest in some of the airspace above the property. The Court next considers the various avigation easements granted by Vacation Village and will save until the actual takings analysis the issue of whether there was an invasion of the property by the County.

2. The Avigation Easements

In its defense, the County alleges that the 1971 and 1988 avigation easements gave it the property rights that Vacation Village is now claiming were taken. Vacation Village responds to this defense by claiming that even if it did grant an avigation easement to the County, the easement was unconstitutionally exacted from it and is consequently null and void. The County asserts, however, that Vacation Village waived its exaction argument and is estopped from making it now. The Court first considers whether Vacation Village has waived its exaction argument.

a. Waiver

The United States Supreme Court has noted that a party "cannot claim the benefit of statutes and afterwards assail their validity. There is no sanctity in such a claim of constitutional right as prevents it being waived as any other claim of right may be." *Wall v. Parrot Silver & Copper Co.*, 244 U.S. 407, 412 (1917); *see also Fahey v. Mallonee*, 332 U.S. 245, 255 (1947) ("It is an elementary rule of constitutional law that one may not 'retain the benefits of the Act while attacking the constitutionality of one of its important conditions'"). Indeed, one method of waiving a benefit is through conduct that is "inconsistent with any other intention than to waive the right." *Mahban v. MGM Grand Hotels, Inc.*, 691 P.2d 421, 423 (Nev. 1984) (per curiam). *See Convent of Saint Joseph v. City of Winston-Salem*, 90 S.E.2d 879, 885 (1956).

Land-use and zoning are two contexts in which the issue of waiver is raised. Within this area, it is generally held that "a landowner who accepts and complies with the conditions of a building permit cannot later sue the issuing public entity for inverse condemnation for the cost of compliance." *Salton Bay Marina, Inc. v. Imperial Irrigation Dist.*, 172 Cal.App.3d 914, 941, 218 Cal.Rptr. 839 (Cal. Ct. App. 1985).

In the case at hand, the Nevada Legislature, through its police power, delegated to the County a certain amount of

regulatory authority in regards to the airport. Specifically, it was given authority in airport hazard areas to "prohibit those land uses which could cause a hazard to air traffic and regulate and restrict the height to which structures and trees may be erected or allowed to grow." N.R.S. § 497.040. Complying with the authority delegated to the County, Vacation Village, on two separate occasions, requested approval to have a portion of its property rezoned to H-1 so that it could build a hotel and casino on the property. On both occasions, the County conditioned approval upon the granting of an avigation easement. As a result of complying with the conditions, the County agreed to rezone the property and gave its approval to build a hotel and casino thereon. Several years after the 1988 avigation easement was granted and after the hotel and casino were substantially completed, Vacation Village comes forward and contends that the avigation easements were unconstitutionally exacted.

In petitioning the Court to allow its claim, Vacation Village relies upon *Salton Bay Marina, Inc. v. Imperial Irrigation Dist.*, 172 Cal.App.3d 914, 941, 218 Cal.Rptr. 839 (Cal. Ct. App. 1985). In this case, defendant, irrigation district, sold plaintiffs property around the Salton Sea. *Id.* Imperial County permitted development on the property, but required the property owners to sign written agreements, agreeing not to sue the County or defendant for flooding, and to grant defendant flooding easements[3] over their property. In time, the property flooded and plaintiffs brought suit. *Id.* at 928.

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[3] Examining the language of the purported easement and the conduct of the parties, the court concluded that the document was not an easement but rather it was an exculpatory clause that violated public policy. *Salton Bay Marina*, 218 Cal.Rptr. at 938-941. The purported easement contained the following language: "THE SOLE PURPOSE of this grant of easement is to absolve grantees from future liability for any damages to the property . . ." *Id.* at 936. Furthermore, the court noted, "[t]he acts of encouraging and allowing development of the property are clearly inconsistent with an intent to flood the property" *Id.*

The California Court of Appeals, after retransfer from the California Supreme Court, found that the plaintiffs had not waived their claims, even though they had granted the easements and built upon their property prior to bringing suit. *Id.* at 942. The court denied defendant's estoppel argument because the purchasers did not truly accept the condition as the price of obtaining, the right to develop their property." *Id.* In other words, the conditions were not readily apparent and did not have an immediate impact. *Id.* "Under these circumstances where the condition concerned only a future possibility, landowners should not be estopped from seeking damages by inverse condemnation once the actual taking occurs." *Id.* at 942 (emphasis removed).

The facts of the case at hand do not lead to the same result. When Vacation Village signed the 1988 avigation easement, it had engaged in negotiations over building heights with the County for many years. It knew there was an airport across the street. It knew planes were already flying overhead, and it knew that building heights were an important issue that directly affected the development of Vacation Village. The effect of signing an avigation easement was apparent and the impact was immediate.

Furthermore, it cannot be said that Vacation Village did not accept the easement as the price of obtaining the right to develop-and build the hotel and casino. Throughout the development of its property, it continually agreed to lower the heights of its hotel and casino so that it would not interfere with the airport and so that it could continue development. Even when it appeared that a condemnation action was imminent, Vacation Village continued to negotiate With the County in an attempt to develop a hotel and casino in some form on its property.

Since Vacation Village has waived its exaction argument, the Court does not consider the merits of that claim. The

Court will, however, consider what rights the avigation easements conveyed to the County.

b. The Language of the Avigation Easement

Generally, the extent of an easement created by conveyance, like any other conveyance of rights in real property, is fixed by the conveyance itself, and "[e]xtrinsic evidence is not admissible for the purpose of interpreting clear and unambiguous terms." *Sievers v. Zenoff*, 573 P.2d 1190, 1192 (Nev. 1978); *see also S.O.C., Inc. v. Mirage Casino-Hotel*, 23 P.3d 243, 247 (Nev. 2001); *Cox v. Glenbrook Co.*, 371 P.2d 647, 652 (Nev. 1962). However, "[w]hen the width [of the easement] is not specified, the conveying instrument must be construed in the light of the facts and circumstances existing at its date and affecting the property . . ." *Cox*, 371 P.2d at 654. More specifically, the court looks to the intention of the parties at the time of the grant and to the "width of the easement as it existed at the time of the grant." *Id.* The court must also keep in mind that "[a] party is privileged to use another's land only to the extent expressly allowed by the easement." *S.O.C.*, 23 P.3d at 247. Therefore, easements are generally "construed strictly in favor of the owner of the property . . ." and "an easement is only as broad as needed to achieve the intended result . . ." *Id.*

The County contends that the avigation easements are clear and unambiguous. This Court, however, finds otherwise. The Nevada Supreme. Court has held that a right-of-way that provides that the holder of the dominant tenement may drive through the servient tenement, but that does not set forth the width and other dimensions of the right-of-way is ambiguous. *Cox*, 371 P.2d at 653-54. The Court finds this situation analogous to the current case. Here, there is an airport with an avigation easement that allows arriving and departing jets to fly through Vacation Village's airspace i.e., property, but that does not set forth the height or other dimensions of the

easement. Therefore, the Court will consider the intent of the parties and dimensions of use at the time of the grant.

Beginning in the late 1960s, Twin Lake and the Heers brothers first began requesting approval to build a hotel and casino on the property. As later envisioned, Vacation Village would include one 80 foot above ground level sign, one 47 foot above ground level casino, five 28 foot above ground level hotel buildings, and three 76 foot above ground level hotel buildings. Vacation Village saw the granting of the avigation easements to the County as a means through which it could obtain the necessary approvals to continue to develop. From these facts, it is readily apparent that Vacation Village did not intend to grant the County an easement in all of the airspace from the ground up, as the County contends.

Examining the dimensions of use at the time of granting yields a similar result. When the 1988 avigation easement was granted, the airport was not using the airspace over the Vacation Village property from the ground up. The aircraft traveling over Vacation Village were using the airspace in the 20:1 approach path that extended from the primary surface for Runway 1R-19L. Additionally, at that time, Runway 1L-19R was much smaller and could not handle large aircraft. Hence the frequency of large aircraft arriving and departing over Vacation Village was much less. The Court concludes that Vacation Village granted the County an avigation easement allowing arriving and departing aircraft to use the 20:1 approach path that extends from the end of the primary surface for Runway 1R-19L. The avigation easement further allows the noise that is inherent from operating such aircraft.

3. Takings Analysis

Because Vacation Village has a property interest in a reasonable amount of airspace over its property and since the avigation easements granted by Vacation Village did not convey all of the airspace from the ground up, the Court will

now consider whether a taking has occurred, thus, entitling Vacation Village to compensation.

Article I, section 8 of the Nevada Constitution states, "[p]rivate property shall not be taken for public use without just compensation having been first made." The Fifth Amendment to the U.S. Constitution similarly provides "nor shall private property be taken for public use, without just compensation." Nevada courts have not decided when the flights of arriving and departing aircraft constitute a taking of property under its constitution. Because both the County and Vacation Village argue that Nevada jurisprudence tracks the federal standard, the Court assumes, without deciding, that the federal and state constitutions provide the same protections from arriving and departing aircraft.[4]

Takings jurisprudence has for many years distinguished between a physical taking and a regulatory taking. As a result, the law varies greatly depending upon the type of taking alleged. *United States v. Causby*, 328 U.S. 256 (1946); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); *Penn Cent. Transp. Co. v. City of N.Y.*, 438 U.S. (1978); *Brown v. United States*, 73 F.3d 1100 (Fed. Cir. 1996).

The United States Supreme Court, in *Causby*, recognized that "the flight of airplanes, which skim the surface [of the ground] but do not touch it, is as much an appropriation of the use of the land as a more conventional entry upon it," and "that the landowner, as an incident to his ownership, has a claim to [superadjacent airspace at this low altitude] and that invasions of it are in the same category as invasions of the surface. *Causby*, 328 U.S. at 264-265. Close to twenty years

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[4] The Court notes that differences in language between the two constitutions indicate that there may be a discrepancy in the timing of payment required by each constitution. However, the timing of the payment is not at issue in the present case.

later, the United States Supreme Court further stated that the approach path for a runway "is as necessary for the operation of the airport as is a surface right of way for operation of a bridge, or as is the land for the operation of a dam . . . an adequate approach way is as a necessary a part of an airport as is the ground on which the airstrip, itself, is constructed." *Griggs*, 369 U.S. at 534. Accordingly, the Court considers the alleged taking of airspace under the physical taking rubric laid out in *Causby* and its progeny.

Causby and subsequent cases have set forth the requirements necessary for a claimant to demonstrate that overflights by aircraft constitute a taking of an avigation easement and therefore require compensation: 1) the aircraft must fly directly over claminant's land; 2) the flights must be low and frequent; and 3) the flights must pose a direct, substantial, and immediate interference with the enjoyment and use of the land. *Causby*, 328 U.S. at 266; *A.J. Hodges Indus. Inc., v. United States*, 355 F.2d 592, 595-96 (Ct. Cl. 1966); *Brown*, 73 F.3d at 1102. Absent such a showing, there can be no taking.

The County does not dispute that the first two requirements have been met. It does, however, argue that Vacation Village has not satisfied the third requirement of demonstrating that the overflights directly, immediately, and substantially interfere with its use of the land. In so doing, the County urges the Court to follow the analysis used by the Texas Supreme Court in *Austin v. Travis County Landfill Co.*, 73 S.W.3d 234 (Tex. 2002). Alternatively, Vacation Village asks the Court to follow the analysis employed by the United States Court of Appeals, for the Federal Circuit, in *Brown v. United States*, 73 F.3d 1100 (Fed. Cir. 1996). While the Court notes it prefers the reasoning of the United States Court of Appeals in *Brown*, it finds that the result is the same regardless of whether the analysis of *Brown* or *Austin* is employed.

In *Brown*, plaintiffs owned a 6,858 acre ranch that they intended to develop and later sell as recreational property.

The Air Force purchased ground near the plaintiffs and began training exercises that required frequent, low altitude flights over the ranch. Even though the flights were frequent and at low altitudes, they did not disturb plaintiff's cattle, nor did they interfere with other revenue generating activities located on the ranch at the time. Defendant argued that "enjoyment and use," as stated in the third prong of *Causby*, only had reference to plaintiff's current use of the property. Since revenues from the use of the property remained the same, defendant argued that plaintiffs failed the *Causby* test.

In discussing this issue, the court noted that the term "enjoyment and use" allowed for a landowner to "enjoy not only the right to put their land to a particular present use, but also to hold the land for investment and appreciation . . ." *Brown*, 73 F.3d at 1104; See *Causby*, 328 U.S. at 261 (noting that a taking may involve the impairment of future uses of land). The court further stated, "[a]n important element in a property owner's bundle of rights is the right to economically exploit his land—the right to sell the land for the best price available in the market, based not only on its current use but on potential other uses for which the market is presently prepared to pay." *Brown*, 73 F.3d at 1104. Accordingly, the court held that a significant and immediate decline in, market price is strongly suggestive of an immediate, direct, and substantial interference with the enjoyment and use of property. *Id.* at 1104-1105.

In *Austin*, the airport, located near plaintiff, was originally owned by the Air Force but later reverted to the defendant. *Austin*, 73 S.W.3d at 237. Unlike *Brown*, or the case at hand, plaintiff had not only granted an avigation easement for the flight of military aircraft over the property but had also granted a clearance easement, which allowed defendant to prohibit or remove structures or even vegetation that extended into the approach paths. *Id.*

The County asserts that this case stands for the conclusion that a takings claim arises under *Causby* only when overflights have adversely affected an existing land use. The Court does not agree and believes that the County's reliance on *Austin* for this proposition is misplaced. The Texas Supreme Court interpreted *Causby* to require a landowner to demonstrate that the overflights "directly and immediately impact the land so that the property is no longer usable for its *intended* purpose." *Id.* at 240. (emphasis added).

In deciding against the plaintiff, the Texas Supreme Court focused its attention on four general categories of evidence marshaled by plaintiff to demonstrate an immediate, direct, and substantial effect on the property. *Id.* at 241. One of the categories of evidence the court examined was the decrease in fair market value of the property. *Id.* In its analysis, the Texas Supreme Court noted that fair-market-value decline is a factor in determining whether there has been an interference in the property's use and enjoyment. *Id.* at 242. The court was reluctant to consider decline in market-value in this case, however, because the appraisers in looking at the decline in market value for the property did not consider the burden placed on the property by the avigation easement or the additional clearance easement, and the plaintiffs were not able to demonstrate that the overflights contributed to the market-value decline. *Id.* at 238.

The Court finds that Vacation Village has shown that the increased frequency of flights of large general aviation aircraft over its property, below the 20:1 avigation easement, directly, substantially, and immediately interfered with the enjoyment and use of its property. The intended use of the property was as a hotel and casino with the heights of various structures ranging from 28 feet to 80 feet. When the FAA issued its hazard determinations for the proposed development, it made it clear that the lower 50:1 approach path and the aircraft traveling along it interfere with this intended use.

Moreover, because aircraft are using a lower approach path over Vacation Village, it has suffered a decline in the market value of its property. Considering this factor is appropriate and in accordance with the views of both the *Austin* and *Brown* courts. The Court finds that the decline in market value is strongly suggestive that there has been an interference with the enjoyment and use of the property.

The Court notes that while it cites the law applied in *Austin*, it arrives at a different result because of factual dissimilarities between the two cases. The dissimilarities include, but are not limited to 1) the fact that Vacation Village did not grant a clearance easement to the County; 2) that the County's appraiser took into account the previously granted avigation easement when she calculated the "before" value of the property;[5] and 3) that Vacation Village was able to demonstrate that the decreased altitude in arriving and departing aircraft contributed to the decline in market value. Accordingly, the Court finds that the County did take the difference in airspace between the 20:1 approach path granted in the 1988 avigation easement and the lower 50:1 precision instrument approach path instituted after the airport expansion.

B. Inverse Condemnation of 1.25 Acres

As previously discussed, there are stark differences in the analysis used for a physical taking as opposed to a regulatory taking. In its third cause of action Vacation Village claims that by enacting § 29.51 of the Clark County Code, the County condemned and took an estimated 1.25 acres of the Vacation Village property for its own use as an RPZ.

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[5] The County's appraiser, Ms. Lowe, calculated the "before" condition of the Vacation Village property assuming that it was subject to Ordinance 728. This Ordinance imposed height limitations on structures in accordance with the 20:1 approach path, which the Court has held was granted to the County in the 1988 avigation easement.

Thus subjecting this claim to scrutiny under the regulatory taking analysis.

Within the regulatory takings jurisprudence there exists two types of analysis: a categorical analysis and an ad hoc factual analysis. *Palazzolo v. R.I.*, 533 U.S. 606, 617 (2001). The categorical analysis, which the Court examines first, sets forth that with certain qualifications a "regulation which 'denies all economically beneficial or productive use of land' will require compensation under the Takings Clause." *Id.* at 617 (quoting *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992)). A regulation that is not considered a categorical taking may yet be considered a taking provided that it satisfies a complex set of factors, as used in *Penn. Cent. Transp. Co. v. New York City*, 438 U.S. 104 (U.S., 1978). *Id.* However, the Court must first address the threshold consideration of whether Vacation Village's claim is ripe for adjudication.

1. Ripeness

In a regulatory taking analysis, the court examines a regulation and determines whether the regulation "goes too far," that is results in a taking of the property. *MacDonald v. Yolo County*, 477 U.S. 340, 348 (1986). As the County correctly indicates, "[a] court cannot determine whether a regulation has gone "too far" unless it knows how far the regulation goes." *Id.* "Under our ripeness rules a takings claim based on a law or regulation which is alleged to go too far in burdening property depends upon the landowner's first having followed reasonable and necessary steps to allow regulatory agencies to exercise their full discretion in considering development plans for the property, including the opportunity to grant any variances or waivers allowed by law." *Palazzolo*, 533 U.S. at 620-621.

However, "[t]he requirements of ripeness in the area of Fifth Amendment takings also cannot be so extended as to become more exhaustive than the substantive issues presented

by the taking claim itself." *Loveladies Harbor, Inc. v. United States*, 15 Cl.Ct. 381, 386 (1988), *aff'd*, 28 F.3d 1171 (Fed. Cir. 1994). Courts are not to require a property owner to resort to "piecemeal litigation" in order to obtain relief. *MacDonald*, 477 U.S. at 350 n.7. Therefore, "when the permissible uses of the property are known to a reasonable degree of certainty, a takings claim is likely to have ripened." *Palazzolo*, 533 U.S. at 620.

In the instant case, it cannot be said that Vacation Village submitted a single set of grandiose building plans to the County for approval and that upon rejection of that single plan has brought suit. Indeed, Vacation Village, through one of its various business entities, has been discussing with the County the development of the hotel and casino since the 1960s. These discussions have resulted in the imposition of increasing height and use limitations. Thus giving the County ample opportunity to exercise discretion in considering development plans. Examining the recent use applications involving the 1.25 acres reveals that Vacation Village has requested to use that land for activities ranging from hotel development to a temporary automobile sales show. Vacation Village received approval for all of these uses. However, the approvals provided that none of the proposed activities could occur on the 1.25 acres.

Furthermore, the permissible uses of the property are known to a reasonable degree of certainty. Section 29.51 of the Clark County Code sets forth a small list of allowable uses for land located within an RPZ. Those allowable uses are primarily limited to parking; landscaping, utility, and communication. Because the nature and extent of permitted development is sufficiently known and the County has had an opportunity to exercise its discretion, there is no need to force Vacation Village to resort to piecemeal litigation to resolve the matter.

2. Categorical Taking

Using the categorical analysis, a court first considers whether all economic use has been denied by the regulation. Under this rule, for a taking to occur, a regulation must allow "*no* productive or economically beneficial use of the land."[6] *Tahoe*, 535 U.S. at 330. The test for a categorical regulatory taking ultimately requires the court to compare "the value that has been taken from the property with the value that remains in the property." *Tahoe-Sierra Pres. Council, Inc., v. Tahoe Reg'l Planning Agency*, 216 F.3d 764, 774 (9th Cir. 2000), *aff'd* 535 U.S. 302 (2002).

For purposes of determining the denominator in the fraction, the court looks at the property as a whole. The United States Supreme Court has noted that regulatory taking jurisprudence "does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole . . ." *Tahoe*, 535 U.S. at 327 (quoting *Penn Central*, 438 U.S. at 130-131).

Accordingly, the Court considers the effect of the regulation upon the entire 24-acre property and not just the effect of the regulation on the 1.25 acres. Consequently, even if the Court were to assume that the 1.25 acres were totally deprived of all economic benefit, the remaining 95% of the property is not. In fact, a casino and hotel are located on the

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[6] "The emphasis on the word 'no' in the text of the opinion was, in effect, reiterated in a footnote explaining that the categorical rule would not apply if the diminution in value were 95% instead of 100%." *Tahoe*, 535 U.S. at 330 (referring to the opinion in *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992)).

remaining 23.65 acres of the property.[7] So, while the regulation does impose a severe burden upon the 1.25 acres, it can hardly be said that the entire property is deprived of all economic benefit, as a result of the regulation. The Court next considers the claim under the framework established in *Penn Central*.

3. *Penn Central*

The *Penn Central* test is "characterized by 'essentially ad hoc, factual inquires." *Tahoe*, 535 U.S. at 322 (quoting *Penn Central*, 438 U.S., at 124). These inquires are designed to allow "'careful examination and weighing of all the relevant circumstances." *Id.* (quoting *Pallazzolo*, 533 U.S., at 636). Under the *Penn Central* test, we examine a) the character of the government action; b) the regulation's economic effect on the landowner; and c) the extent to which the regulation interferes with the reasonable investment-backed expectations. *Palazzolo*, 533 U.S. at 617. Once again these inquiries consider the regulation's effect upon the entire parcel and not the effect upon any discrete segment. *Tahoe*, 535 U.S. at 327.

a. Character of Government Action

Determining the character of the government action requires a balancing of Vacation Village's interests against the County's need to protect the public. *See Keystone Bituminous Coal Assoc. v. DeBenedictis*, 480 U.S. 470, 485-86 (1987). The Nevada Legislature delegated its police power to the County in order that it might enforce airport zoning and prevent hazards. N.R.S. § 497.040. The Nevada Legislature found that "an airport hazard endangers the lives and property of users of the airport and of occupants of land in its vicinity,

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[7] In 1993, in a letter written by CEH to the County, CEH stated that Vacation Village's occupancy rate exceeded 90% and average gaming revenue per guest exceeded $350 per day. Furthermore, for the years 1994 through 2000, annual revenue for Vacation Village ranged from $10.6 million to $14.1 million.

and also, if of the obstruction type, in effect reduces the size of area available for the landing, takeoff and maneuvering of aircraft, thus tending to destroy or impair the utility of the airport and the public investment therein." N.R.S. § 497.030. The Court is convinced that there is a genuine and substantial need in regulating the airspace and use of land surrounding an airport and that the public, as a whole, benefits from such regulation.

b. Economic Effect

While the Court notes that the designation as an RPZ did limit the uses for which the 1.25 acres could be used, it did not eliminate all potential uses. That small portion of the property could still be put to use as a water feature, as some form of landscaping, or possibly as a parking lot. Furthermore, as already discussed the remaining 95% of the property is not adversely affected by § 29.51. As the United States Supreme Court has stated, "where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking." *Tahoe*, 535 U.S. at 327 (quoting *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979).

c. Investment-Backed Expectations

While § 29.51 may have interfered to a certain extent with Vacation Village's investment-backed expectations, the United States Supreme Court has allowed the frustration of investment-backed expectations when the regulation furthers important public policies. *Penn Central*, 438 U.S. at 124-128. This is because "[g]overnment could hardly go on if to some extent values incident to property could not be diminished without paying for every change in the general law." *Id.* at 124.

Furthermore, it is important to note that Vacation Village's expectations have always been limited by the fact that it is located across from an airport, which has been in existence from before Twin Lake took over ownership of the property.

Even back in 1964, when Twin Lake first purchased the property, there were regulations limiting the use of airspace and land surrounding the airport. For the aforementioned reasons, the Court finds that § 29.51 of the Clark County Code did not take 1.25 acres of the Vacation Village property.

C. Access Easements

At the outset, it is noted that the parties have stipulated that the County physically obstructed Vacation Village's use of the access easements when it took the Transamerica parcel for the I-15 interchange. The United States Supreme Court has stated, "[w]hen faced with a constitutional challenge to a permanent physical occupation of real property, this Court has invariably found a taking." *Loretto*, 458 U.S. at 427. The County is permanently and physically occupying Vacation Village's easements. Therefore, there is little question that a taking has occurred.

C. Compensation

The government must pay the fair market value for private property taken for a public purpose. *United States v. 760.807 Acres of Land*, 731 F.2d 1443, 1446 (9th Cir. 1984). "Fair market value is the amount of money which a well informed purchaser, willing but not obliged to buy the property would pay, and which a well informed purchaser, willing but not obliged to sell it would accept, taking into consideration all uses to which the property is adapted and might in reason be applied." *State v. Wilson*, 493 F.2d 1252 (Wash. App. 1972). When considering "all uses," court appropriately examine "evidence regarding the highest and best use to which the land is put or reasonably may be adapted in the future . . . and assume that buyers or seller of ordinary prudence are knowledgeable and not motivated by speculation or conjecture." *760.807 Acres of Land*, 731 F.2d at 1446. In most condemnation cases, the best evidence of fair market value of real property is found in "sales of comparable property within

a reasonable time before the taking." *City of Elko v. Zillich*, 683 P.2d 5, 7 (Nev. 1984). Any decrease or increase in the fair market value of the property before the date of valuation which is caused by the public work must be disregarded. N.R.S. § 37.112.

Both parties retained appraisers to address the compensation questions. Charles E. Jack IV was retained by Vacation Village and Shelli Lowe was retained by Clark County. Both appraisers employed the same general technique in valuing the airspace. They both subtracted the value of the property after the taking from the value of the property prior to the taking. This is where the similarities end, however.

In calculating the before-value of the property, Mr. Jack operated under the premise that there were no height restrictions on the property. The Court's findings, however, make it evident that the premise of no height restrictions is incorrect. There was an easement conveyed to the County for the airspace above a 20:1 approach path extending from the end of the runway. Mr. Jack's reliance upon the premise that there were no height restrictions renders his before-value of the airspace useless in the current calculation of compensation.

Ms. Lowe in her before-value calculation does take into account height restrictions over Vacation Village. However, her use of comparables is suspect. Her comparables are all located further south than Vacation Village, and therefore, further away from the Strip. Ultimately, Ms. Lowe calculates the before-value of the Vacation Village property at $5.50 a square foot and the after-condition of the property at $5.00 sq. ft. This results in an award of compensation of $543,000.

The result is that there is no clearly correct valuation of the airspace. Mr. Jack employed an incorrect assumption and Ms. Lowe chose questionable comparables. At trial, counsel stated that they would prefer getting new appraisals based

rather than have the Court attempt to blend Mr. Jack's and Ms. Lowe's appraisals. Accordingly, the Court withholds ruling upon an amount of compensation for all claims in this case until new a[illegible]isals can be obtained.

III. JUDGMENT

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Plaintiff Vacation Village, Inc. be awarded compensation from Clark County, Nevada for the taking of airspace between the 20:1 approach path granted in the avigation easement and the lower 50:1 precision instrument approach path.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Vacation Village be awarded compensation from the County for the taking of the access easements.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the County did not take Vacation Village's 1.25 acres when it enacted § 29.51 of the Clark County Code.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that compensation will be determined after additional appraisals have been obtained.

DATED this 29th day of Dec., 2004.

/s/ Robert C. Jones
ROBERT C. JONES
UNITED STATES BANKRUPTCY JUDGE

APPENDIX E

FEDERAL STATUTES

49 U.S.C. § 40102. Definitions

(a) General definitions.—In this part—

* * * *

(32) "navigable airspace" means airspace above the minimum altitudes of flight prescribed by regulations under this subpart and subpart III of this part, including airspace needed to ensure safety in the takeoff and landing of aircraft.

* * * *

49 U.S.C. § 40103. Sovereignty and use of airspace

(a) Sovereignty and public right of transit.—(1) The United States Government has exclusive sovereignty of airspace of the United States.

(2) A citizen of the United States has a public right of transit through the navigable airspace. To further that right, the Secretary of Transportation shall consult with the Architectural and Transportation Barriers Compliance Board established under section 502 of the Rehabilitation Act of 1973 (29 U.S.C. 792) before prescribing a regulation or issuing an order or procedure that will have a significant impact on the accessibility of commercial airports or commercial air transportation for handicapped individuals.

(b) Use of airspace.—(1) The Administrator of the Federal Aviation Administration shall develop plans and policy for the use of the navigable airspace and assign by regulation or order the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace. The Administrator may modify or revoke an assignment when required in the public interest.

(2) The Administrator shall prescribe air traffic regulations on the flight of aircraft (including regulations on safe altitudes) for—

(A) navigating, protecting, and identifying aircraft;

(B) protecting individuals and property on the ground;

(C) using the navigable airspace efficiently; and

(D) preventing collision between aircraft, between aircraft and land or water vehicles, and between aircraft and airborne objects.

* * * *

49 U.S.C. § 47107. Project grant application approval conditioned on assurances about airport operations

(a) General written assurances.—The Secretary of Transportation may approve a project grant application under this subchapter for an airport development project only if the Secretary receives written assurances, satisfactory to the Secretary, that—

* * * *

(9) appropriate action will be taken to ensure that terminal airspace required to protect instrument and visual operations to the airport (including operations at established minimum flight altitudes) will be cleared and protected by mitigating existing, and preventing future, airport hazards;

(10) appropriate action, including the adoption of zoning laws, has been or will be taken to the extent reasonable to restrict the use of land next to or near the airport to uses that are compatible with normal airport operations;

* * * *

APPENDIX F

FEDERAL REGULATION

14 C.F.R. § 91.119 Minimum safe altitudes: General.

Except when necessary for takeoff or landing, no person may operate an aircraft below the following altitudes:

(a) Anywhere. An altitude allowing, if a power unit fails, an emergency landing without undue hazard to persons or property on the surface.

(b) Over congested areas. Over any congested area of a city, town, or settlement, or over any open air assembly of persons, an altitude of 1,000 feet above the highest obstacle within a horizontal radius of 2,000 feet of the aircraft.

(c) Over other than congested areas. An altitude of 500 feet above the surface, except over open water or sparsely populated areas. In those cases, the aircraft may not be operated closer than 500 feet to any person, vessel, vehicle, or structure.

(d) Helicopters. Helicopters may be operated at less than the minimums prescribed in paragraph (b) or (c) of this section if the operation is conducted without hazard to persons or property on the surface. In addition, each person operating a helicopter shall comply with any routes or altitudes specifically prescribed for helicopters by the Administrator.

APPENDIX G

LOCAL ORDINANCES

Bill No. 12-16-80-2

SUMMARY—An Ordinance adopting a new Chapter 29.50 to limit the height of objects around all public use airports within Clark County, Nevada, and repealing the existing Chapter 29.50.

ORDINANCE NO.—728
(of Clark County, Nevada)

AN ORDINANCE TO AMEND TITLE 29 OF THE CLARK COUNTY CODE BY ADDING THERETO A NEW CHAPTER DESIGNATED AS 29.50 WHICH REGULATES AND RESTRICTS THE HEIGHT OF STRUCTURES AND OTHERWISE REGULATES THE USE OF THE PROPERTY WITHIN THE JURISDICTION OF CLARK COUNTY, NEVADA AND IN THE VICINITY OF ALL PUBLIC USE AIRPORTS BY CREATING THE APPROPRIATE ZONES AND ESTABLISHING THE BOUNDARIES THEREOF; PROVIDING FOR CHANGES IN THE RESTRICTIONS AND BOUNDARIES OF SUCH ZONES; DEFINING CERTAIN TERMS USED HEREIN; REFERRING TO THE MC CARRAN INTERNATIONAL AIRPORT AIRSPACE ZONING MAP WHICH IS INCORPORATED IN AND MADE A PART OF THIS ORDINANCE; REPEALING THE EXISTING CHAPTER 29.50 OF THE CLARK COUNTY CODE; PROVIDING FOR ENFORCEMENT AND PROVIDING OTHER MATTERS PROPERLY RELATING THERETO.

THE BOARD OF COMMISSIONERS OF THE COUNTY OF CLARK, STATE OF NEVADA, DOES HEREBY ORDAIN AS FOLLOWS:

SECTION 1. Legislative Findings. It is hereby found that an obstruction has the potential for endangering the lives and

property of users of any public use Airport, and property or occupants of land within Clark County, Nevada, in the vicinity of these Airports; that an obstruction may affect existing and future instrument approach minimums of any public use Airport; that an obstruction may reduce the size of the areas available for the landing, takeoff, and maneuvering of aircraft, thus tending to destroy or impair the utility and capacity of these Airports and the public investment therein. Accordingly, it is declared:

(A) That the establishment of an obstruction has the potential of being a public nuisance and may injure the region served by McCarran International Airport or any other public use Airport;

(B) That it is necessary in the interest of the public health, public safety, and general welfare that the establishment of obstructions that are a hazard to air navigation be prevented; and

(C) That the prevention of these obstructions should be accomplished to the extent legally possible by the exercise of the police power without compensation.

SECTION 2. That the present Chapter 29.50 of the Clark County Code is hereby repealed in its entirety.

SECTION 3. That a new Chapter 29.50 be adopted as follows:

CHAPTER 29.50

PUBLIC USE AIRPORT HEIGHT ZONING RESTRICTIONS

Sections:

29.50.010 Definitions
29.50.020 Airport zones
29.50.030 Airport zone height limitations
29.50.040 Use restrictions
29.50.050 Nonconforming uses
29.50.060 Variances

29.50.010 DEFINITIONS. As used in this Ordinance, unless the context otherwise requires;

1. PUBLIC USE AIRPORT—means any of the following airports in Clark County, Nevada: McCarran International Airport, Overton Airport, Searchlight Airport, Jean Airport, No. Las Vegas Airport, Boulder City Airport, Echo Bay Airport, Henderson Sky Harbor Airport, Three Corners Airport, Hidden Hills Airport.

2. AIRPORT ELEVATIONS—The highest point of an airport's usable landing area measured in feet above mean sea level.

3. APPROACH SURFACE—A surface longitudinally centered on the extended runway centerline, extending outward and upward from the end of the primary surface and at the same slope as the approach zone height limitation slope set forth in Section 29.50.030 of this Ordinance. In plan the perimeter of the approach surface coincides with the perimeter of the approach zone.

4. APPROACH, TRANSITIONAL, HORIZONTAL, AND CONICAL ZONES—These zones are set forth in Section 29.50.020 of this Ordinance.

5. CONICAL SURFACE—A surface extending outward and upward from the periphery of the horizontal surface at a slope of 20 to 1 for a horizontal distance of 4,000 feet.

(6) HAZARD TO AIR NAVIGATION—An obstruction determined to have a substantial adverse effect on the safe and efficient utilization of the navigable airspace.

(7) HEIGHT—For the purpose of determining the height limits in all zones set forth in this Ordinance and/or shown on an airspace zoning map, the datum shall be mean sea level elevation unless otherwise specified.

(8) HORIZONTAL SURFACE—A horizontal plane 150 feet above the established airport elevation, the perimeter of

which in plan coincides with the perimeter of the horizontal zone.

(9) LARGER THAN UTILITY RUNWAY—A runway that is constructed for and intended to be used by propeller driven aircraft of greater than 12,500 pounds maximum gross weight and jet power aircraft.

(10) NONCONFORMING USE—Any pre-existing structure or use of land which is inconsistent with the provisions of this Ordinance or an amendment thereto.

(11) NONPRECISION INSTRUMENT RUNWAY—A runway having an existing instrument approach procedure utilizing air navigation facilities with only horizontal guidance, or area type navigation equipment, for which a straight-in nonprecision instrument approach procedure has been approved or planned.

(12) OBSTRUCTION—Any structure, growth, or other object, including a mobile object, which exceeds a limiting height set forth in Section 29.50.030 of this Ordinance.

(13) PERSON—An individual, firm, partnership, corporation, company, association, joint stock association, or governmental entity; includes a trustee, a receiver, an assignee, or a similar representative of any of them.

(14) PRECISION INSTRUMENT RUNWAY—A runway having an existing instrument approach procedure utilizing an instrument landing system (ILS) or a precision approach radar (PAR). It also means a runway for which a precision approach system is planned and is so indicated on an approved airport layout plan.

(15) PRIMARY SURFACE—A surface longitudinally centered on a runway. When the runway has a specially prepared hard surface, the primary surface extends 200 feet beyond each end of that runway, when the runway has no specially prepared hard surface, or planned hard surface, the

primary surface ends at each end of that runway. The width of the primary surface varies with the type of runway and its approach and is set forth in Section 29.50.020. The elevation of any point on the primary surface is the same as the elevation of the nearest point on the runway centerline.

(16) RUNWAY—a defined area on an airport prepared for landing and take-off of aircraft along its length.

(17) STRUCTURE—An object, including a mobile object, constructed or installed by man, including but without limitation, buildings, towers, cranes, smokestacks, earth formation, signs and overhead transmission lines.

(18) TRANSITIONAL SURFACES—These surfaces extend outward at 90 degree angles to the runway centerline and the runway centerline extended at a slope of seven (7) feet horizontally for each foot vertically from the sides of the primary and approach surfaces to where they intersect the horizontal and conical surfaces. Transitional surfaces for those portions of the precision approach surfaces, which project through and beyond the limits of the conical surface, extend a distance of 5,000 feet measured horizontally from the edge of the approach surface and at 90 degree angles to the extended runway centerline.

(19) TREE—Any object of natural growth

(20) UTILITY RUNWAY—A runway that is constructed for and intended to be used by propeller driven aircraft of 12,500 pounds maximum gross weight and less.

(21) VISUAL RUNWAY—A runway intended solely for the operation of aircraft using visual approach procedures.

29.50.020 AIRPORT ZONES. In order to carry out the provisions of this Ordinance, there are hereby created and established certain zones which include all of the airspace above the height of 35 feet above the surface of the land, lying beneath the approach surfaces, transitional surfaces, horizontal surfaces, and conical surfaces as they apply to the portions

of any public use Airport lying within the jurisdiction of Clark County, Nevada. Such zones for McCarran International Airport are shown on the McCarran International Airport Airspace Zoning Map consisting of three (3) sheets, prepared by the Clark County Airport Engineering Department dated September 10, 1979, a copy of which is on file at the County Clerk's office and which is hereby incorporated by reference and made a part hereof. An area located in more than one (1) of the following zones is considered to be only in the zone with the more restrictive height limitations. The various zones are hereby established and defined as follows:

(A) *Runway Approach Zones*

(1) McCarran International Airport

(a) Utility Runway Visual Approach Zone—Runways 19R, 01L.

The inner edge of this approach zone coincides with the width of the primary surface and is 250 feet wide. The approach zone expands outward uniformly to a width of 1,250 feet at a horizontal distance of 5,000 feet from the primary surface. Its centerline is the continuation of the centerline of the runway.

(b) Runway Larger than Utility Visual Approach Zones—Runways O1R, 07L, 07R.

The inner edge of this approach zone coincides with the width of the primary surface and is 1,000 feet wide. The approach zone expands outward uniformly to a width of 1,500 feet at a horizontal distance of 5,000 feet from the primary surface. Its centerline is the continuation of the centerline of the runway.

(c) Precision Instrument Runway Approach Zones—Runways 19L, 25R, 25L

The inner edge of this approach zone coincides with the width of the primary surface and is 1,000 feet

wide. The approach zone expands outward uniformly to a width of 16,000 feet at a horizontal distance of 50,000 feet from the primary surface. Its centerline is the continuation of the centerline of the runway.

(2) All Other Public Use Airports

(a) Utility Runway Visual Approach Zone

The inner edge of this approach zone coincides with the width of the primary surface 250 feet wide. The approach zone expands outward uniformly to a width of 1,250 feet at a horizontal distance of 5,000 feet from the primary surface. Its centerline is the continuation of the centerline of the runway.

(b) Utility Runway Nonprecision Instrument Approach Zone

The inner edge of this approach zone coincides with the width of the primary surface and is 500 feet wide. The approach zone expands outward uniformly to a width of 2,000 feet at a horizontal distance 5,000 feet from the primary surface. Its centerline is the continuation of the centerline of the runway.

(c) Runway Larger Than Utility Visual Approach Zone

The inner edge of this approach zone coincides with the width of the primary surface and is 500 feet wide. The approach zone expands outward uniformly to a width of 1,500 feet at a horizontal distance of 5,000 feet from the primary surface. Its centerline is the continuation of the centerline of the runway.

(d) Runway Larger Than Utility with A Visibility Minimum Greater than 3/4 Mile Nonprecision Instrument Approach Zone

The inner edge of this approach zone coincides with the width of the primary surface and is 500 feet wide.

The approach zone expands outward uniformly to a width of 3,500 feet at a horizontal distance of 10,000 feet from the primary surface. Its centerline is the continuation of the centerline of the runway.

(e) Runway Larger Than Utility With A Visibility Minimum As Low as 3/4 Mile Nonprecision Instrument Approach Zone

The inner edge of this approach zone coincides with the width of the primary surface and is 1,000 feet wide. The approach zone expands outward uniformly to a width of 4,000 feet at a horizontal distance of 10,000 feet from the primary surface. Its centerline is the continuation of the centerline of the runway.

f. Precision Instrument Runway Approach Zone

The inner edge of this approach zone coincides with the width of the primary surface and is 1,000 feet wide. The approach zone expands outward uniformly to a width of 16,000 feet at a horizontal distance of 50,000 feet from the primary surface. Its centerline is the continuation of the centerline of the runway.

(B) *Transition Zones*

Transition zones are established adjacent to each runway and approach zone and are the areas beneath the transitional surfaces. Transition zones extend outward from the primary surface and shall slope upward and outward one (1) foot vertically for each seven (7) feet horizontally to the point where they intersect the surface of the horizontal zone. Transition zones are also established adjacent to approach zones for the entire length of the approach zones. Such transition zones flare symetrically with either side of the runway approach zones from the base of such zones, and slope upward and outward at the rate of one (1) foot vertically for each

seven (7) feet horizontally to the points where they intersect the surface of the horizontal and conical zones. Transition zones are also established adjacent to a precision instrument approach zone where it projects through and beyond the limits of the conical zone, extending a distance of 5,000 feet measured horizontally from the edge of the instrument approach zone at right angles to the runway centerline.

(C) *Horizontal Zone*

The horizontal zone is the area beneath the horizontal surface and is established by swinging arcs of 5,000 feet radii for all runways designated utility or visual and 10,000 feet radii for all others from the center of each end of the primary surface of each runway and connecting the adjacent arcs by drawing lines tangent to those arcs. The horizontal surface is located at a height of 150 feet above the established airport elevation. The horizontal zone does not include the approach zones or transition zones.

(D) *Conical Zone*

The conical zone lies beneath the conical surface established as the area commencing at the periphery of the horizontal zone and extending upward one (1) foot in height for every twenty (20) feet of horizontal distance outward therefore a distance of 4,000 feet. The conical zone does not include the instrument approach zones or transition zones.

29.50.030 AIRPORT ZONE HEIGHT LIMITATIONS

Except as otherwise provided in this Ordinance, no structure shall be erected, alerted, or maintained in any zone created by this Ordinance to a height in excess of the applicable height limit herein established for such zone. However, nothing in this Ordinance shall be construed as prohibiting

the construction or maintenance of any structure to a height up to 35 feet above the surface of the land in any zone created by this Ordinance. Further, no building or structure shall be erected within the zones unless the Federal Aviation Administration (FAA) of the United States of America and the Director of Aviation of Clark County shall have determined that the building or structure is so situated or marked that it would not be a hazard. All construction within the various height zones shall be subject to the property owners' signing an avigation easement. Such applicable height limitations are hereby established for each of the zones in question as follows:

(A) *Runway Approach Zones*

(1) McCarran International Airport

(a) Utility Runway Visual Approach Zone—Runways 19R, 01L

Slopes twenty (20) feet outward for each foot upward beginning at the end of and at the same elevation as the primary surface and extending to a horizontal distance of 5,000 feet along the extended runway centerline.

(b) Runway Larger than Utility Visual Approach Zones—Runways 01R, 07L, 07R

Slopes twenty (20) feet outward for each foot upward beginning at the end of and at the same elevation as the primary surface and extending to a horizontal distance of 5,000 feet along the extended runway centerline.

(c) Precision Instrument Runway Approach Zones—Runway 19L, 25R, 25L.

Slopes fifty (50) feet outward for each foot upward beginning at the end of and at the same elevation as the primary surface and extending to a horizontal dis-

tance of 10,000 feet along the extended runway centerline; thence slopes upward forty (40) feet horizontally for each foot vertically to an additional horizontal distance of 40,000 feet along the extended runway centerline.

(2) *All other Public Use Airports*

(a) Utility Runway Visual Approach Zone

Slopes twenty (20) feet outward for each foot upward beginning at the end of and at the same elevation as the primary surface and extending to a horizontal distance of 5,000 feet along the extended runway centerline.

(b) Utility Runway Nonprecision Instrument Approach Zone

Slopes twenty (20) feet outward for each foot upward beginning at the end of and at the same elevation as the primary surface and extending to a horizontal distance of 5,000 feet along the extended runway centerline.

(c) Runway Larger than Utility Visual Approach Zone

Slopes twenty (20) feet outward for each foot upward beginning at the end of and at the same elevation as the primary surface and extending to a horizontal distance of 5,000 feet along the extended runway centerline.

(d) Runway Larger than Utility With a Visibility Minimum Greater than 3/4 Mile Nonprecision Instrument Approach Zone

Slopes thirty-four (34) feet outward for each foot upward beginning at the end of and at the same elevation as the primary surface and extending to a

horizontal distance of 10,000 feet along the extended runway centerline.

(e) Runway Larger than Utility With a Visibility Minimum As Low as 3/4 Mile Nonprecision Instrument Approach Zone.

Slopes thirty-four (34) feet outward for each foot upward beginning at the end of and at the same elevation as the primary surface and extending to a horizontal distance of 10,000 feet along the extended runway centerline.

(f) Precision Instrument Runway Approach Zone

Slopes fifty (50) feet outward for each foot upward beginning at the end of and at the same elevation as the primary surface and extending to a horizontal distance of 10,000 feet along the extended runway centerline; thence slopes upward forty (40) feet horizontally for each foot vertically to an additional horizontal distance of 40,000 feet along the extended runway centerline.

(B) *Transition Zones*

Slope one (1) foot vertically for each seven (7) feet horizontally beginning at the sides of and at the same elevation as the primary surface and approach surface, and extending to a height of 150 feet above the airport elevation. In addition to the foregoing, there are established height limits of one (1) foot vertically for each seven (7) feet horizontally beginning at the sides of and the same elevation as all approach zone surfaces for the entire length of all approach zone surfaces and extending upward and outward to the points where they intersect the horizontal and conical surfaces. Where the precision instrument runway approach zone projects beyond the conical zone surface, a height limit of one (1) foot for

each seven (7) feet of horizontal distance shall be maintained beginning at the sides of and the same elevation as the approach surface, and extending a horizontal distance of 5,000 feet measured at 90 degree angles to the extended runway centerline.

(C) *Horizontal Zone*

One hundred fifty (150) feet above the established Airport elevation.

(D) *Conical Zone*

One (1) foot vertical height for each twenty (20) feet of horizontal distance beginning at the periphery of the horizontal zone and extending a horizontal distance of 4,000 feet to a height of 350 feet above the airport elevation.

29.50.040 USE RESTRICTIONS

Notwithstanding any other provisions of this Ordinance, no use may be made of land or water within any zone established by this Ordinance in such a manner as to create electrical interference with navigation signals or radio communication between the airport and aircraft, make it difficult for pilots to distinguish between airport lights and others, result in glare in the eyes of pilots using the airport, impair visibility in the vicinity of the airport, create bird strike hazards, or otherwise in any way endanger or interfere with the landing, takeoff, or maneuvering of aircraft intending to use the airport.

29.50.050 NONCONFORMING USES

(A) Regulations Not Retroactive

The regulations prescribed by this Ordinance shall not be construed to require the removal, lowering, or other change or alteration of any structure not conforming to the regulations as of the effective date of this Ordinance, or otherwise interfere with the continuance of a noncomforming

use. Nothing contained herein shall require any change in the construction, alteration, or intended use of any structure, the construction or alteration of which was begun prior to the effective date of this Ordinance, and is diligently prosecuted.

(B) Marking and Lighting

Notwithstanding the preceding provisions of this Section, the owner of any existing nonconforming structure may be required to install, operate, and maintain thereon such markers and lights as may be deemed necessary by the Director of Aviation to indicate to the operators of aircraft in the vicinity of the airport the presence of such airport obstruction.

29.50.060 VARIANCES

(A) Future Uses

Any person desiring to erect or increase the height of any structure, or to permit the growth of any tree, or other wise use his property in a manner which would constitute a violation of these regulations, may apply to the Clark County Planning Commission for a variance from these regulations. Such variances will be allowed where a literal application or enforcement of these regulations would result in practical difficulty or unnecessary hardship, and the relief granted would not be contrary to the public interest, but would do substantial justice and be in accordance with the spirit of these regulations and of Chapter 29.66 of the Clark County Code. Any such variance allowed may be subject to any reasonable conditions that the Clark County Planning Commission or Board of County Commissioners may deem necessary to effectuate the purposes of Chapter 29.66 of the Clark County Code, including, *but not limited to*, the condition to require the owner of the structure or tree in question to install, operate, and maintain, at the owner's expense, such markings and lights as may be

necessary. If deemed proper by the Board of Clark County Commissioners, this condition may be modified to require the owner to permit Clark County, at its own expense, to install, operate, and maintain the necessary markings and lights.

(B) Existing Uses

No permit shall be granted that would allow the establishment or creation of an obstruction or permit a nonconforming use, structure, or tree to become a greater hazard to air navigation than it was on the effective date of this Ordinance or any amendments thereto or than it is when application for a permit is made.

(C) Nonconforming Uses Abandoned or Destroyed

Whenever a nonconforming structure, as set forth in the provisions of Chapter 29.45, has been abandoned or more than 50 percent (50%) torn down, physically deteriorated, or decayed, no permit shall be granted that would allow such structure to exceed the applicable height limit or otherwise deviate from the zoning regulations.

SECTION 4: Enforcement and Penalties.

The penalties and enforcement provisions set forth in Chapter 29.74 of the Clark County Code shall govern the provisions of this Chapter.

SECTION 5: If any section of this Ordinance or portion thereof is for any reason held invalid or unconstitutional by any court of competent jurisdiction, such holding shall not invalidate the remaining portions of this Ordinance.

SECTION 6: All Ordinances, parts of ordinances, chapters, sections, subsections, clauses, phrases or sentences contained in the Clark County Code in conflict herewith are hereby repealed.

SECTION 7: This Ordinance shall take effect and be in force from and after its passage and publication thereof by title only, together with the names of the County Commissioners voting for or against the passage, in a newspaper published in and having a general circulation in Clark County, Nevada, at least once a week for a period of two (2) weeks.

PROPOSED ON THE 16th DAY OF December, 1980

PROPOSED BY: Thalia Dondero

PASSED ON THE 20th DAY OF January, 1981

VOTE: AYES Robert N. Broadbent
David Canter
Manuel Cortez
Thalia Dondero
Jack R. Petitti
Richard J. Ronzone

NAYS None

ABSTAINING None

ABSENT Woodrow Wilson

BOARD OF COUNTY COMMISSIONERS
CLARK COUNTY, NEVADA

BY: /s/ Manuel Cortez
Chairman, MANUEL CORTEZ

ATTEST:

/s/ Loretta Bowman
LORETTA BOWMAN, County Clerk

This Ordinance shall be in force and effect from and after the 3rd day of February, 1981.

APPROVED AS TO FORM:
ROBERT J. MILLER, DISTRICT ATTORNEY

By: /s/ Thomas R. Severns
Deputy, THOMAS R. SEVERNS

[Bracketed] material is that portion being deleted
Underlined material is that portion being added

BILL NO. 6-20-90-2

SUMMARY—An Ordinance to amend Chapter 29.50 to enlarge the area included within the regulations governing airport airspace zoning and height restrictions and to adopt new airport airspace zoning maps for McCarran International Airport, North Las Vegas Airport, Overton Airport and Jean Airport.

ORDINANCE NO. 1221
(of Clark County, Nevada)

AN ORDINANCE TO AMEND TITLE 29, CHAPTER 29.50. PUBLIC USE AIRPORT HEIGHT ZONING RESTRICTIONS BY ADOPTING SPECIFIC AIRSPACE ZONING MAPS FOR MCCARRAN INTERNATIONAL, NORTH LAS VEGAS, OVERTON AND THE JEAN AIRPORTS, TO PROVIDE THAT NOTICE MUST BE GIVEN TO THE FAA PRIOR TO CONSTRUCTION WITHIN THE PROVIDED HEIGHT STANDARDS, TO MODIFY THE LANGUAGE PROVIDING FOR VARIANCE PROCEDURES AND PROVIDING FOR OTHER MATTERS PROPERLY RELATING THERETO.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF CLARK, STATE OF NEVADA, DOES HEREBY ORDAIN AS FOLLOWS:

29.50.010 Definitions. As used in this chapter, unless the context otherwise requires or the definition is inconsistent with a definition by the Federal Aviation Administration:

(1) "Public use airport" means any of the following airports in Clark County, Nevada: McCarran International Airport, Overton Airport, Searchlight Airport, Jean Airport, No. Las Vegas Airport, Boulder City Airport, Echo Bay Airport,

Henderson Sky Harbor Airport, Three Corners Airport, Hidden Hills Airport.

(2) "Airport elevations" mean the highest point of an airport's usable landing area measured in feet above mean sea level.

[(3) "Approach surface" means a surface longitudinally centered on the extended runway centerline, extending outward and upward from the end of the primary surface and at the same slope as approach zone height limitation slope set forth in Section 29.50.030. In plan, the perimeter of the approach surface coincides with the perimeter of the approach zone.

(4) "Approach, transitional, horizontal, and conical zones" are as set forth in Section 29.50.020.

(5) "Conical Surface" means a surface extending outward and upward from the periphery of the horizontal surface at a slope of 20:1 for a horizontal distance of four thousand feet.]

[(6)] (3) "Hazard to air navigation" means an obstruction determined to have a substantial adverse effect on the safe and efficient utilization of navigable airspace.

[(7)] (4) "Height." For the purpose of determining the height limits in all zones set forth in this chaper [sic] and/or shown on an airspace zoning map, the datum shall be mean sea level elevation unless otherwise specified.

[(8) "Horizontal surface" means a horizontal plane one hundred fifty feet above the established airport elevation, the perimeter of which in plan coincides with the perimeter of the horizontal zone.

(9) "Larger than utility runway" means a runway that is constructed for and intended to be used by propeller driven aircraft of greater than twelve thousand five hundred pounds maximum gross weight and jet power aircraft.]

[(10)] (5) "Nonconforming use" means any pre-existing structure or use of land which is inconsistent with the provisions of this chapter or an amendment thereto.

[(11) "Nonprecision instrument runway" means a runway having an existing instrument approach procedure utilizing air navigation facilities with only horizontal guidance, or area type navigation equipment, for which a straight-in nonprecision instrument approach procedure has been approved or planned.]

[(12)] (6) "Obstruction" means any structure, growth, or other object, including a mobile object, which exceeds a limiting height set forth in Section 29.50.030.

[(13)] (7) "Person" means an individual, firm, partnership, corporation, company, association, joint stock association, or governmental entity; includes a trustee, a receiver, an assignee, or a similar representative of any of them.

[(14) "Precision instrument runway" means a runway having an existing instrument approach procedure utilizing an instrument landing system (ILS) or a precision approach radar (PAR). It also means a runway for which a precision approach system is planned and is so indicated on the Official Airport Airspace Zoning Maps.

(15) "Primary surface" means a surface longitudinally centered on a runway. When the runway has a specially prepared hard surface, the primary surface extends 200 feet beyond each and of that runway, when the runway has no specially prepared hard surface or planned hard surface, the primary surface ends at each end of that runway. The width of the primary surface varies with the type of runway and its approach and is set forth in Section 29.50.020. The elevation of any point on the primary surface is the same as the elevation of the nearest point on the runway centerline.]

[(16)] (8) "Runway" means a defined area on an airport prepared for landing and takeoff of aircraft along its length.

(9) "Runway Protection Zone" (formerly "Runway Clear Zone") means a trapezoidal area at ground level, for the purpose of protecting the safety of approaches and keeping the area clear of the congregation of people.

[(18)] (10) "Structure" means an object, including a mobile object, constructed or installed by man, including but without limitation, buildings, towers, cranes, smokestacks, earth formation, signs and overhead transmission lines.

[(19) "Transitional surfaces" mean surfaces which extend outward at ninety degree angles to the runway centerline, and the runway centerline extended at a slope of seven feet horizontally for each foot vertically from the sides of the primary and approach surfaces to where they intersect the horizontal and conical surfaces. Transitional surfaces for those portions of the precision approach surfaces, which project through and beyond the limits of the conical surface, extend a distance of five thousand feet measured horizontally from the edge of the approach surface and at ninety degree angles to the extended runway centerline.]

[(20)] (11) "Tree" means any object of natural growth.

[(21) "Utility runway" means a runway that is constructed for and intended to be used by propeller driven aircraft of twelve thousand five hundred pounds maximum gross weight and less.

(22) "Visual runway" means a runway intended solely for the operation of aircraft using visual approach procedures. (Ord. 728 & 3 (part), 1981)]

29.50.020 Airport zones. In order to carry out the provisions of this chapter, there are created and established certain zones which include all of the airspace above the height of thirty-five feet above the surface of the land, lying

beneath the approach surfaces, transitional surfaces, horizontal surfaces, and conical surfaces, as they apply to the portions of any public use airport lying within the jurisdiction of Clark County, Nevada. Such zones for [McCarran International Airport] each public use airport are shown on the [McCarran International] Official Airport Airspace Zoning Map [consisting of three sheets, prepared by the Clark County Airport Engineering Department dated September 10, 1979,] for each public use airport as adopted by specific map as put forth in §29.50.050. [a copy of which is on file at the county clerk's office and which is hereby incorporated by reference and made a part hereof.] An area located in more than one of the [following] airport zones is considered to be only in the zone with the more restrictve height limitations.

[(A) Runway Approach Zones.

(1) McCarran International Airport

(a) Utility Runway Visual Approach Zone Runways 19R, 01L. The inner edge of this approach zone coincides with the width of the primary surface and is two hundred fifty feet wide. The approach zone expands outward uniformly to a width of one thousand two hundred fifty feet at a horizontal distance of five thousand feet from the primary surface. Its centerline is the continuation of the centerline of the runway.

(b) Runway Larger than Utility Visual Approach Zones—Runways 01L, 07L, 07R. The inner edge of this approach zone coincides with the width of the primary surface and is one thousand feet wide. The approach zone expands outward uniformly to a width of one thousand five hundred feet at a horizontal distance of five thousand feet from the primary surface. Its centerline is the continuation of the centerline of the runway.

(c) Precision Instrument Runway Approach Zones Runways 19L, 25R, 25L. The inner edge of this approach zone coincides with the width of the primary surface and is

one thousand feet wide. The approach zone expands outward uniformly to a width of sixteen thousand feet at a horizontal distance of fifty thousand feet from the primary surface. Its centerline is the continuation of the centerline of the runway.

(2) All Other Public Use Airports

(a) Utility Runway Visual Approach Zone. The inner edge of this approach zone coincides with the width of the primary surface two hundred fifty feet wide. The approach zone expands outward uniformly to a width of one thousand two hundred fifty feet at a horizontal distance of five thousand feet from the primary surface. Its centerline is the continuation of the centerline of the runway.

(b) Utility Runway Nonprecision Instrument Approach Zone. The inner edge of this approach zone coincides with the width of the primary surface and is five hundred feet wide. The approach zone expands outward uniformly to a width of two thousand feet at a horizontal distance five thousand feet from the primary surface. Its centerline is the continuation of the centerline of the runway.

(c) Runway Larger than Utility Visual Approach Zone. The inner edge of this approach zone coincides with the width of the primary surface and is five hundred feet wide. The approach zone expands outward uniformly to a width of one thousand five hundred feet at a horizontal distance of five thousand feet from the primary surface. Its centerline is the continuation of the centerline of the runway.

(d) Runway Larger than Utility with a Visibility minimum Greater than Three-fourths Mile Nonprecision Instrument approach Zone. The inner edge of this approach zone coincides with the width of the primary surface and is five hundred feet wide. The approach zone expands outward uniformly to a width of three thousand five hundred feet at a horizontal distance of ten thousand feet from the primary surface. Its centerline is the continuation of the centerline of the runway.

(e) Runway Larger than Utility with a Visibility Minimum as Low as Three-fourths Mile Nonprecision Instrument Approach Zone. The inner edge of this approach zone coincides with the width of the primary surface and is one thousand feet wide. The approach zone expands outward uniformly to a width of four thousand feet at a horizontal distance of ten thousand from the primary surface. Its centerline is the continuation of the centerline of the runway.

(f) Precision Instrument Runway Approach Zone. The inner edge of this approach zone coincides with the width of the primary surface and is one thousand feet wide. The approach zone expands outward uniformly to a width of sixteen thousand feet at a horizontal distance of fifty thousand feet from the primary surface. It centerline is the continuation of the centerline of the runway.

(B) Transition Zones. Transition zones are established adjacent to each runway and approach zone and are the areas beneath the transitional surfaces. Transition zones extend outward from the primary surface and shall slope upward and outward one foot vertically for each seven feet horizontally to the point where they intersect the surface of the horizontal zone. Transition zones are also established adjacent to approach zones for the entire length of the approach zones. Such transition zones flare symmetrically with either side of the runway approach zones from the base of such zones, and slope upward and outward at the rate of one foot vertically for each seven feet horizontally to the points where they intersect the surface of the horizontal and conical zones. Transition zones are also established adjacent to a precision instrument approach zone where it projects through and beyond the limits of the conical zone, extending a distance of five thousand feet measured horizontally from the edge of the instrument approach zone at right angles to the runway centerline.

(C) Horizontal Zone. The horizontal zone is the area beneath the horizontal surface and is established by swinging

arcs of five thousand feet radii for all runways designated utility or visual and ten thousand feed [sic] radii for all others from the center of each end of the primary surface of each runway and connecting the adjacent arcs by drawing lines tangent to those arcs. The horizontal surface is located at a height of one hundred fifty feet above the established airport elevation. The horizontal zone does not include the approach zones or transition zones.

(D) Conical Zone. The conical zone lies beneath the conical surface established as the area commencing at the periphery of the horizontal zone and extending upward one foot in height for every twenty feet of horizontal distance outward therefore for a distance of four thousand feet to a height of three hundred and fifty (350) feet above the airport elevation. The conical zone does not include the instrument approach zones or transition zones. (Ord. 728 & 3 (part), 1980)]

29.50.030 Airport zone height limitations. (A) Except as otherwise provided in this chapter, no structure shall be erected, [alerted] altered, or maintained in any airport zone [created by this chapter to a height] that would violate the height limitations depicted in the maps adopted herewith [in excess of the applicable height limit established in this chapter for such zones]. However, nothing in this chapter shall be construed as prohibiting the construction or maintenance of any structure to a height up to thirty-five feet above the surface of the land in any zone created by this chapter. [Further, no Building or structure shall be erected within the zones unless the Federal Aviation Administration (FAA) of the United States of America and the director of aviation of the county shall have determined that the building or structure is so situated or marked that it would not be a hazard] Any building or structure constructed within the zones shall be situated or marked as approved by the Federal Aviation Administration and the Clark County Department of Aviation so that it does not constitute a hazard as defined

in Section 29.50.010(3). All construction within the various height zones shall be subject to the property owner's signing an avigation easement. [Such applicable height limitations are established for each of the zones in question as follows:

(A) Runway Approach Zones.

(1) McCarran International Airport.

(a) Utility Runway Visual Approach Zone—Runways 19R, 01L. Slopes twenty feet outward for each foot upward beginning at the end of and at the same elevation as the primary surface and extending to a horizontal distance of five thousand feet along the extended runway centerline.

(b) Runway Larger than Utility Visual Approach Zones—Runways 01R, 07L, 07R. Slopes twenty feet outward for each foot upward beginning at the end of and at the same elevation as the primary surface and extending to a horizontal distance of five thousand feet along the extended runway centerline.

(c) Precision Instrument Runway Approach Zones Runway 19L, 25R, 25L. Slopes fifty feet outward for each foot upward beginning at the end of and at the same elevation as the primary surface and extending to a horizontal distance of ten thousand feet along the extended runway centerline; thence slopes upward forty feet horizontally for each foot vertically to an additional horizontal distance of forty thousand feet along the extended runway centerline.

(2) All Other Public Use Airports.

(a) Utility Runway visual Approach Zone. Slopes twenty feet outward for each foot upward beginning at the end of and at the same elevation as the primary surface and extending to a horizontal distance of five thousand feet along the extended runway centerline.

(b) Utility Runway Nonprecision Instrument approach Zone. Slopes twenty feet outward for each foot

upward beginning at the end of and at the same elevation as the primary surface and extending to a horizontal distance of five thousand feet along the extended runway centerline.

(c) Runway Larger than Utility Visual Approach Zone. Slopes twenty feet outward for each foot upward beginning at the end of and at the same elevation as the primary surface and extending to a horizontal distance of five thousand feet along the extended runway centerline.

(d) Runway Larger than Utility with a visibility Minimum Greater than Three-fourths Mile Nonprecision Instrument Approach Zone. Slopes thirty-four feet outward for each foot upward beginning at the end of and at the same elevation as the primary surface and extending to a horizontal distance of ten thousand feet along the extended runway centerline.

(e) Runway Larger than Utility with a Visibility Minimum As Low as Three-fourths Mile Nonprecision Instrument Approach Zone. Slopes thirty-four feet outward for each foot upward beginning at the end of and at the same elevation as the primary surface and extending to a horizontal distance of ten thousand feet along the extended runway centerline.

(f) Precision Instrument Runway Approach Zone. Slopes fifty feet outward for each foot upward beginning at the end of and at the same elevation as the primary surface and extending to a horizontal distance of ten thousand feet along the extended runway centerline; thence slopes upward forty feet horizontally for each foot vertically to an additional horizontal distance of forth [sic] thousand feet along the extended runway centerline.

(B) Transition Zones. Slopes one foot vertically for each seven feet horizontally beginning at the sides of and at the same elevation as the primary surface and approach surface, and extending to a height of one hundred fifty feet above the airport elevation. In addition to the foregoing, there are extablished [sic] height limits of one foot vertically for each

seven feet horizontally beginning a [sic] the sides of and the same elevation as all approach zone surfaces for the entire length of all approach zone surfaces and extending upward and outward to the points where they intersect the horizontal and conical surfaces. Where the precision instrument runway approach zone projects beyond the conical zone surface, a height limit of one foot for each seven feet of horizontal distance shall be maintained beginning at the sides of and the same elevation as the approach surface, and extending a horizontal distance of five thousand feet measured at ninety degree angles to the extended runway centerline.

(C) Horizontal Zone. One hundred fifty feet above the established airport elevation.

(D) Conical Zone. One foot vertical height for each twenty feet of horizontal distance beginning at the periphery of the horizontal zone and extending a horizontal distance of four thousand feet to a height of three hundred fifty feet above the airport elevation. (Ord. 728 &3 (part), 1980)]

29.50.040 Notices of Construction or Alteration.

(A) Any person proposing construction or alteration in the environs of any public use airport or airport operated by the United States Armed Services shall notify the Chief, Air Traffic Division, FAA Regional Office having jurisdiction over the area within which the construction or alteration will be located not less than thirty days before the commencement of the construction or alteration if such construction or alteration exceeds any of the following height standards:

(1) Two hundred (200) feet above the ground level at its site.

(2) The plane of an imaginary surface extending outward and upward at a slope of 100 to 1 for a horizontal distance of 20,000 feet from the nearest point of the nearest runway of any airport subject to the provisions of this chapter.

(3) For highways, railroads and other traverse ways for mobile objects; if construction or alteration is of greater height than the standards set forth in subparagraphs (1) or (2) hereinbefore after their height has been adjusted upward for the appropriate traverse way as follows:

(a) For interstate highways: 17 feet

(b) For any other public roadways: 15 feet

(c) For any private road: 10 feet or the height of the highest mobile object that would normally traverse the road, whichever is greater.

(d) For any railroad: 23 feet

(e) For a waterway or any otherunspecified [sic] traverse way: the height of the highest mobile object that would normally use the traverse way.

(4) When requested by the FAA, any construction or alteration that would be in an instrument approach area and available information indicates the height might exceed any FAA obstruction standard.

Any notice required by this section shall be on FAA Form 7460-1, available from the regional offices of the Federal Aviation Administration.

(B) Construction or Alteration not requiring notice. Notice to the FAA is not required for construction or alteration of any of the following:

(1) Any object that would be shielded by existing structures of a permanent and substantial character or by natural terrain or topographical features of equal or greater height, and would be located in the congested area of a city, town, or settlement where it is evident beyond all reasonable doubt that the structure so shielded will not adversely affect safety in air navigation.

(2) Any antenna structure of 20 feet or less in height except one that would increase the height of another antenna structure.

(3) Any air navigation facility, airport visual approach or landing aid, aircraft arresting device, or meteorological device, of a type approved by the Administrator, or an appropriate military service on military airports, the location and height of which is fixed by its functional purpose.

(4) Any construction or alteration for which notice is required by any other FAA regulation.

29.50.050 Official Airport Airspace Zoning Maps. The following official airport airspace zoning maps for specific public use airports lying within the jurisdiction of Clark County, Nevada, as adopted by ordinance of The Board of Clark County Commissioners, are on file at the office of the County Clerk and hereby incorporated by reference and made a part hereof:

(A) The McCarran International Airport Official Airspace Zoning Map, consisting of five (5) sheets,prepared [sic] by the Clark County Airport Engineering Department dated July 18, 1990 and adopted by Ordinance Number 1221.

(B) The North Las Vegas Air Terminal Official Airspace Zoning Map, consisting of one (1) sheet, prepared by the Clark County Airport Engineering Department dated July 18, 1990 and adopted by Ordinance Number 1221.

(C) The Overton Airport Official Airspace Zoning Map, consisting of one (1) sheet, prepared by the Clark County Airport Engineering Department dated July 18, 1990 and adopted by Ordinance Number 1221.

(D) The Jean Airport Official Airspace Zoning Map consisting of one (1) sheet, prepared by the Clark

County Airport Engineering Department dated July 18, 1990 and adopted by Ordinance Number 1221.

29.50.060 Use restrictions. Notwithstanding any other provisions of this chapter, no use may be made of land or water within any zone established by this chapter in such a manner as to create electrical interference with navigation signals or radio communication between the airport and aircraft, make it difficult for pilots to distinguish between airport lights and others, result in glare in the eyes of pilots using the airport, impair visibility in the vicinity of the airport, create bird strike hazards, or otherwise in any way endanger or interfere with the landing, takeoff, or maneuvering of aircraft intending to use the airport. (Ord. 728 & 3 (part), 1980)

29.50.070 Nonconforming uses. (A) Regulations Not Retroactive. The regulations prescribed by this chapter shall not be construed to require the removal, lowering, or other change or alteration of any structure not conforming to the regulations as of the effective date of this chapter, or otherwise interfere with the continuance of a nonconforming use. Nothing contained in this chapter shall require any change in the construction, alteration, or intended use of any structure, the construction or alteration of which was begun prior to the effective date of this chapter, and is diligently prosecuted.

(B) Marking and Lighting. Notwithstanding the preceding provisions of this section, the owner of any existing nonconforming structure may be required to install, operate, and maintain thereon such markers and lights as may be deemed necessary by the director of aviation to indicate to the operators of aircraft in the vicinity of the airport the presence of such airport obstruction. (Ord. 728 & 3 (part), 1980)

29.50.080 Variances. (A) Future Uses. Any person desiring to erect or increase the height of any structure, or to permit the growth of any tree, or otherwise use his property in a manner which would constitute a violation of these regu-

lations, may apply to the county planning commission for a variance from these regulations. Such variances [will] may be allowed where a literal application or enforcement of these regulations would result in practical difficulty or unnecessary hardship, and the relief granted would not be contrary to the public interest, but would do substantial justice and be in accordance with the spirit of these regulations [and of Chapter 29.66]. Any such variance allowed may be subject to any reasonable conditions that the county planning commission or board of county commissioners may deem necessary to effectuate the purposes of [Chapter 29.66,] Title 29 including, but not limited to, the condition to require the owner of the structure or tree in question to install, operate, and maintain, at the owner's expense, such markings and lights as may be necessary. If deemed proper by the board of county commissioners, this condition may be modified to require the owner to permit the county, at its own expense, to install, operate, and maintain the necessary markings and lights. Variances pursuant to this chapter shall be considered under the procedures put forth under Section 29.66 of this title with the exception that the applicant shall notify the FAA Regional Office of the application prior to the time of submission of the variance application and that the Planning Commissions' action concerning the variance application shall be considered advisory only, with all variances being referred to the Board of County Commissioners for final disposition.

(B) Existing Uses. No permit shall be granted that would allow the establishment or creation of an obstruction or permit a nonconforming use, structure, or tree to become a greater hazard to air navigation than it was on the effective date of this chapter or any amendments thereto, or than it is when application for a permit is made.

(C) Nonconforming Uses Abandoned or Destroyed. Whenever a nonconforming structure, as set forth in the provisions of Chapter 29.45, has been abandoned or more than fifty per-

cent torn down, physically deteriorated, or decayed, no permit shall be granted that would allow such structure to exceed the applicable height limit or otherwise deviate from the zoning regulations.

SECTION 2. If any section of this ordinance or portion thereof is for any reason held invalid or unconstitutional by any court of competent jurisdiction, such holding shall not invalidate the remaining parts of this ordinance.

SECTION 3. All ordinances, parts of ordinances, chapters, sections, subsections, clauses, phrases or sentences contained in the Clark County Code in conflict herewith are hereby repealed.

SECTION 4. This ordinance shall take effect and be in force from and after its passage and the publication thereof by title only, together with the names of the County Commissioners voting for or against its passage, in a newspaper published in and having a general circulation in Clark County, Nevada, at least once a week for a period of two (2) weeks.

PROPOSED on the 20th day of June, 1990.

PROPOSED BY Manuel J. Cortez &
William U. Pearson

PASSED on the 18th day of July, 1990.

VOTE:

AYES: Jay Bingham
Paul J. Christensen
Manuel J. Cortez
Thalia M. Dondero
Karen Hayes

NAYS: None

ABSTAINING: None

ABSENT: William U. Pearson
Bruce L. Woodbury

BOARD OF COUNTY
COMMISSIONERS
CLARK COUNTY, NEVADA

By /s/ Bruce L. Woodbury
Chairman

ATTEST:

/s/ Loretta Bowman
LORETTA BOWMAN, County Clerk

This ordinance shall be in force and effect from and after the 1st day of August, 1990.

73

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No. 07-373

FILED
NOV 19 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

CLARK COUNTY, A POLITICAL SUBDIVISION OF THE STATE OF NEVADA,

Petitioner,

v.

VACATION VILLAGE, INC., CEH PROPERTIES, LTD., TIMOTHY S. HEERS, TERRIE HEERS THOMPSON, CHERYL D. NOLTE, GARY R. HEERS, AND CATHLEEN HEERS NORCOTT,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

PAUL C. RAY, ESQ.
Counsel of Record
JOHN PETER LEE, LTD.
830 Las Vegas Blvd. South
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Counsel for Respondents

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether federal aviation law precludes States from requiring airport operators to pay compensation when airspace usable for private development is appropriated for public transit use.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, respondents Vacation Village, Inc., and CEH Properties, Ltd., state that neither respondent has a parent corporation, and that no publicly held company owns 10% or more of either respondent's stock.

TABLE OF CONTENTS

	Page
Question Presented	i
Corporate Disclosure Statement	ii
Introduction	1
Statement	2
I. Factual Background	2
A. Clark County Expands Its Airport And Recognizes Its Duty To Pay For Airspace Over The Vacation Village Property	2
B. Clark County Adopts A New Zoning Ordinance To Avoid Paying For Airspace Over The Vacation Village Property	4
II. Proceedings Below	5
A. Proceedings In The Trial Courts	5
B. Proceedings In The Court of Appeals	7
1. The Jurisdictional Rulings	7
2. The Merits	9
Argument	10
I. Clark County Admits That The Decision Below Presents No Square Circuit Conflict	12
A. The Court of Appeals' Decision Is A Straightforward Application of *Jankovich*	12
B. The Circuit Cases On Which Clark County Relies Are Inapposite	14

TABLE OF CONTENTS—Continued

		Page
	C. Clark County's Attempts To Distinguish *Jankovich* Do Not Warrant This Court's Review	17
	D. Federal Statutes And Regulations Recognize Airports' Duty To Pay Just Compensation Under Federal Or Local Law	19
II.	Clark County Exaggerates The Importance Of The Decision Below	22
III.	This Case Is A Poor Vehicle To Reach The Question Presented	23
	A. Multiple Threshold Jurisdictional Issues Make This Case An Inadequate Vehicle	24
	1. Ripeness	25
	2. *Rooker-Feldman*	26
	3. Bankruptcy Jurisdiction	26
	4. Withdrawal Of The Reference	27
	5. Separation Of Powers	28
	B. The Federal Takings Claim Presents An Alternative Ground For Affirmance	29
Conclusion		30

TABLE OF AUTHORITIES

Page

CASES

Air Pegasus of D.C., Inc. v. *United States*, 424 F.3d 1206 (Fed. Cir. 2005) 14, 15

Bieneman v. *City of Chicago*, 864 F.2d 463 (7th Cir. 1988) 16

Celotex Corp. v. *Edwards*, 514 U.S. 300 (1995) 27

City of Austin v. *Travis County Landfill Co., L.L.C.*, 73 S.W.3d 234 (Tex. 2002) 15

Cowell v. *Palmer Township*, 263 F.3d 286 (3d Cir. 2001) 25

Exxon Mobil Corp. v. *Saudi Basic Indus. Corp.*, 544 U.S. 280 (2005) 26

Fiese v. *Sitorius*, 526 N.W.2d 86 (Neb. 1995) 17

Griggs v. *Allegheny County*, 369 U.S. 84 (1962) 13, 14, 22

In re Pegasus Gold Corp., 394 F.3d 1189 (9th Cir. 2005) 27

In re Pruitt, 910 F.2d 1160 (3d Cir. 1990) 27

Jankovich v. *Indiana Toll Road Comm'n*: 93 N.E.2d 237 (Ind. 1963) 12, 18
cert. dissm'd, 379 U.S. 487 (1965) ..... *passim*

Kelo v. *City of New London*, 545 U.S. 469 (2003) 9

Krueger v. *Mitchell*, 332 N.W.2d 733 (Wis. 1983) 17

TABLE OF AUTHORITIES—Continued

Page

McCarran Int'l Airport v. *Sisolak*:
137 P.3d 1110 (Nev. 2006) 7, 9, 10, 18
cert. denied, 127 S. Ct. 1260 (2007) 2

Northern Pipeline Constr. Co. v. *Marathon Pipe Line Co.*, 457 U.S. 50 (1982) 29

Ruhrgas AG v. *Marathon Oil Co.*, 526 U.S. 574 (1999) 24

Silkwood v. *Kerr-McGee Corp.*, 464 U.S. 238 (1984) 16

Singleton v. *Comm'r*, 439 U.S. 940 (1978) 12

Smith v. *Phillips*, 455 U.S. 209 (1982) 30

United States v. *Causby*, 328 U.S. 256 (1946) 22, 29, 30

United States v. *City of New Haven*, 496 F.2d 452 (2d Cir. 1974) 15, 16

Vacation Village v. *Clark County*, Nos. 05-16173+ (9th Cir. Jul. 23, 2007) 7

Vorhees v. *Naper Aero Club, Inc.*, 272 F.3d 398 (7th Cir. 2001) 16

Williamson County Regional Planning Comm'n v. *Hamilton Bank*, 473 U.S. 172 (1985) 25

STATUTES

28 U.S.C. § 158 ..... 27, 28

28 U.S.C. § 1334(b) 8, 26, 27

42 U.S.C. § 4651 5

49 U.S.C. § 40102(a)(32) 14, 21

49 U.S.C. § 40110(a) 19

49 U.S.C. § 47106(b)(1) 5

TABLE OF AUTHORITIES—Continued

	Page
49 U.S.C. § 47102(3)	19
49 U.S.C. § 47125(a)	19
Airport and Airway Improvement Act of 1982, Pub. L. No. 97-248, §§ 511(a)(4), 513(a)(2), 96 Stat. 324, 671, 687-88, 689 (1982)	19
Federal Airport Act, ch. 251, 60 Stat. 170, 176 (1946)	19
Federal Aviation Act, Pub. L. No. 85-726, 72 Stat. 739 (1958)	14
Nev. Rev. Stat. § 342.105	5
ADMINISTRATIVE MATERIALS	
14 C.F.R. § 60.17 (1965)	14
14 C.F.R. § 91.119 (2006)	14
14 C.F.R. § 151.9(c)	20
14 C.F.R. § 151.11(a)-(d)	20
14 C.F.R. § 151.11(f)	20
Advisory Circular No. 150/5100-17: Land Acquisition and Relocation Assistance for Airport Improvement Assisted Projects (Nov. 7, 2005), *available at* www.faa.gov	21
Advisory Circular No. 150/5190-4A: A Model Zoning Ordinance to Limit Heights of Objects Around Airports (Dec. 14, 1987), *available at* www.faa.gov	20
FAA Discussion Paper on Zoning for Airports (Sept. 8, 1987)	20

TABLE OF AUTHORITIES—Continued

Page

FAA, *Land Use Compatibility and Airports* (2005), *available at* www.faa.gov 21

MISCELLANEOUS

Nev. R. Civ. P. 41(e) 26

Pet. Br. in *Jankovich* v. *Indiana Toll Road Comm'n*, 379 U.S. 487 (filed Oct. 9, 1964) 13, 23

U.S. Br. as *Amicus Curiae* in *Jankovich* v. *Indiana Toll Road Comm'n*, 379 U.S. 487 (filed Nov. 1964) 13

Pet. in *McCarran Int'l Airport & Clark County* v. *Sisolak*, No. 06-658 (filed Nov. 8, 2006) 10, 11, 14

Br. in Opp. in *McCarran Int'l Airport & Clark County* v. *Sisolak*, No. 06-658 (filed Jan. 12, 2007) 11, 20, 24

IN THE

Supreme Court of the United States

No. 07-373

CLARK COUNTY, A POLITICAL SUBDIVISION OF THE STATE OF NEVADA,

Petitioner,

v.

VACATION VILLAGE, INC., CEH PROPERTIES, LTD., TIMOTHY S. HEERS, TERRIE HEERS THOMPSON, CHERYL D. NOLTE, GARY R. HEERS, AND CATHLEEN HEERS NORCOTT,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR RESPONDENTS IN OPPOSITION

INTRODUCTION

Airports regularly use their power of eminent domain to acquire land and airspace needed for expansion. The sole question presented by the petition is whether federal aviation law precludes the State of Nevada from requiring Nevada airport operators to pay compensation when airspace usable for private development is appropriated for public transit use. Last Term, this Court denied a petition presenting precisely the same question, authored by the same counsel, on behalf of the same petitioner.

See *McCarran Int'l Airport & Clark County* v. *Sisolak*, No. 06-658 (cert. denied Feb. 20, 2007). Nothing warrants a different result here. Petitioner Clark County admits that there is no split of authority; both the Nevada Supreme Court and the Ninth Circuit now agree that the County's claim lacks merit. And unlike the case at issue in the prior petition, this case is a wholly inadequate vehicle for review of the question presented. While the parties in *Sisolak* agreed that the question was properly before the Court, here petitioner pressed *five* separate jurisdictional challenges below, all of which this Court would have to address before reaching the merits. If the question presented truly is as important as the County claims, it will recur in future cases; there is no need to grant review in a case plagued with jurisdictional issues. Accordingly, the petition should be denied.

STATEMENT

I. FACTUAL BACKGROUND

A. Clark County Expands Its Airport and Recognizes Its Duty To Pay for Airspace Over the Vacation Village Property

In 1988, respondent CEH Properties, Ltd. ("CEH"), a Nevada resort developer, acquired title to the Vacation Village property, a parcel of land near McCarran Airport in Las Vegas, Nevada. At the time, the only air traffic rules restricting the height of construction on the property were contained in Clark County Ordinance No. 728. That ordinance set height restrictions at one foot for every 20 feet from the end of the runway ("20/1"). Pet. App. 72a. The vast majority of the Vacation Village property was outside that 20/1 "approach zone." C.A. E.R. 282-283; C.A. S.E.R. 45, 47.

On May 2, 1989, Clark County considered a plan to change runway 1R at McCarran from a visual-approach runway to a precision-instrument-approach runway,

which would require lower height restrictions over property to the south of the airport, including Vacation Village. Clark County recognized that it would have to compensate landowners for that change:

> [A]irport staff is requesting authorization to obtain appraisals of the property that would be impacted by protection for a precision approach to runway 1R.
>
> Once the market value is established through the appraisal process, this information will be presented * * * for approval of the potential acquisitions.

C.A. S.E.R. 23.

Representatives of the airport met with CEH and the Heers family and assured them that the airport did not intend to condemn the Vacation Village property. C.A. S.E.R. 29. CEH then obtained necessary permits and began to complete construction of the first phase of its hotel and casino. Pet. App. 6a; C.A. E.R. 242; C.A. S.E.R. 18.

On October 25, 1989, airport representatives met to discuss whether to withdraw CEH's building permits to give them additional leverage when negotiating the price of the Vacation Village property. The discussion included the following:

> Heers has one remaining permit to pull but it is for remodeling of a second floor area and there would be no leverage by holding [the] permit. On 9/20/89, the building permit for the 2 story (new building) casino area was approved.
>
> Some alternative[s]: Condemn airspace, condemn land, revoke building permit (which would not be legal) or negotiate. All alternatives would result in [a] lawsuit.

C.A. S.E.R. 18. Clark County did not disclose those discussions to CEH; nor did Clark County reveal its intent to block CEH's full development of its hotel and casino. As a result, construction continued.

On January 16, 1990, the FAA determined that Clark County's new lower height restrictions conflicted with CEH's development plan, which included an 80-foot high sign, three 76-foot high hotel buildings and a 47-foot high casino. Pet. App. 6a. McCarran's director once again acknowledged the County's obligation to pay in a statement to the Clark County Commission:

> There are a combination of circumstances that have led us to think that probably the best solution * * * is for the County or for the Department of Aviation through the County to begin the process to acquire this piece of property. * * * It would have been better had we had the money at the time and be[en] able to do that certainly before they started construction, but we weren't in that position.

C.A. S.E.R. 25-26. The County Commission then approved the airport's request to appraise and acquire the property. *Id.* at 27. Nevertheless, the County did not provide an appraisal of the property for more than twelve years.

B. Clark County Adopts a New Zoning Ordinance To Avoid Paying for Airspace Over the Vacation Village Property

On August 1, 1990, Clark County adopted Ordinance No. 1221, setting new height restrictions of one foot for every *50 feet* from the end of the runway. Pet. App. 6a. As a result, the entire buildable space of the Vacation Village property became part of the airport approach zone. C.A. E.R. 282-283. Under the new ordinance, presumptive height limits on the Vacation Village property ranged from a mere 5 to 25 feet (although another code

provision effectively authorized construction up to 35 feet over most of the property). Pet. App. 42a; C.A. E.R. 282. All limits were less than half the height of CEH's original 80-foot-tall development plan. Pet. App. 6a. Still, the County did not pay any compensation.

Clark County refused to pay even though it received federal funding from the FAA and additional funding through FAA-approved Passenger Facility Charges ("PFCs") for expansion of the airport. C.A. S.E.R. 110, 161, 170-174. A condition of receipt of such funding was obtaining the right to clear the airspace needed for take-off and landing. See 49 U.S.C. § 47106(b)(1). Clark County provided written assurances to the FAA that it had complied with that requirement by appraisal and negotiation, avoiding the need for condemnation. C.A. S.E.R. 175, 182; see also 42 U.S.C. § 4651, made applicable in Nevada by Nev. Rev. Stat. § 342.105.

In 1991, Clark County obtained FAA permission to impose PFCs on airlines using the expanded runway system. C.A. S.E.R. 98, 100, 105-106, 110-113. Clark County established a $60 million budget line-item for acquiring property in connection with the expansion. *Id.* at 100, 104-106, 119-124. This unspent line-item related to only two properties, one of which was Vacation Village, *id.* at 104, 106, and Clark County admitted below that it had already acquired the other property, C.A. Reply Br. 8.[1]

II. PROCEEDINGS BELOW

A. Proceedings in the Trial Courts

In 1993, CEH and the other respondents brought an inverse condemnation claim in Nevada state court, which

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[1] Clark County claims to have spent more than $40 million (separate from the $60 million PFC line-item) acquiring land and other property interests to "protect the navigable airspace." Pet. 8-9. But nothing in the record supports that claim.

was removed to federal bankruptcy court after CEH filed a petition for reorganization under Chapter 11 of the Bankruptcy Code. Pet. App. 6a, 7a. At trial, CEH presented evidence of its plans for an 80-foot-tall hotel/casino and the 35-foot height limit that the County's ordinance imposed, *id.* at 39a, 42a, as well as testimony that, because of consumer preferences, tall buildings were particularly important for casino/hotel developments, C.A. S.E.R. at 79. CEH also introduced videotape evidence of frequent low flights through Vacation Village airspace and tracking data showing flights directly over the property. *Id.* at 49, 53-54. Evidence showed that 15% to 20% of large aircraft at McCarran, including Boeing 747's, Boeing 757's and McDonald Douglas MD-80's, land on the runways at issue. *Id.* at 55-57.

After the trial but before any decision, the presiding bankruptcy judge (the Hon. Robert C. Jones) was appointed to the district court. Pet. App. 8a-9a. Despite having taken the bench as a district judge, Judge Jones continued to hold proceedings and enter orders in the case while it was in bankruptcy court. *Id.* at 8a, 36a.

On December 30, 2004, Judge Jones issued dispositive findings of fact and conclusions of law. Pet. App. 36a. He determined that the lower approach path of Clark County's new plan "directly, substantially, and immediately interfered with the enjoyment and use of [CEH's] property," namely, its "intended use" as a "hotel and casino with the heights of various structures ranging from 28 feet to 80 feet." Pet. App. 54a. "[T]he decreased altitude in arriving and departing aircraft contributed to [a] decline in market value" of the property. *Id.* at 55a. After hearing appraisals, Judge Jones found that the value of CEH's property was reduced from $10 per square foot to $5.50 per square foot. *Id.* at 27a. On January 4, 2005, Judge Jones, acting as a district judge, *sua sponte* with-

drew the bankruptcy court reference, and eventually entered judgment. *Id.* at 9a, 26a, 31a.

B. Proceedings in the Court of Appeals

Clark County appealed to the Ninth Circuit, and CEH cross-appealed. While the appeal was pending, the Nevada Supreme Court decided *McCarran International Airport* v. *Sisolak*, 137 P.3d 1110 (Nev. 2006). That case raised a takings challenge to the same ordinance at issue here; it was brought by the owner of property south of Vacation Village that was also affected by the McCarran airport expansion. Many of the facts are identical. In *Sisolak*, the Nevada Supreme Court concluded that the airport's actions were a taking under both the Federal and Nevada Constitutions. *Id.* at 1124.

After receiving supplemental briefing on *Sisolak*, the Ninth Circuit affirmed in part and remanded in part. Pet. App. 1a-25a.[2] Before turning to the merits, the court of appeals rejected a series of challenges that Clark County had raised to the bankruptcy court's and district court's subject-matter jurisdiction.

1. *The Jurisdictional Rulings*

The court of appeals first considered Clark County's claim that the district court "lacked subject matter jurisdiction under the *Rooker-Feldman* doctrine." Pet. App. 9a-10a. Clark County argued that the bankruptcy court had committed a "patent violation of the *Rooker-Feldman* doctrine" by revisiting prior state-court rulings on timeliness, urging that the bankruptcy court itself had "expressed concerns" about violating that doctrine. C.A. Br. 18-19. The court of appeals concluded, however, that

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[2] The court also issued an unpublished memorandum disposition addressing other issues not relevant here. *Vacation Village* v. *Clark County*, Nos. 05-16173+ (9th Cir. Jul. 23, 2007).

the state court's rulings were not sufficiently final to trigger *Rooker-Feldman*. Pet. App. 10a.

The court of appeals then turned to Clark County's challenge to subject-matter jurisdiction under the Bankruptcy Code. The County argued that the bankruptcy court lacked jurisdiction under 28 U.S.C. § 1334(b) because the case was not sufficiently "related to" any bankruptcy proceeding. Rejecting that argument, the court of appeals found that the lawsuit was part of the bankruptcy estate, and that its status as part of the estate was sufficient to confer jurisdiction. Pet. App. 12a.

Third, the court of appeals addressed the County's claim that the takings challenge was unripe because CEH had not properly pursued state remedies. Pet. App. 12a-14a. The court stated that "'[r]ipeness is more than a mere procedural question; it is determinative of jurisdiction.'" *Id.* at 12a. The court then reviewed the precedents on ripeness and whether the bankruptcy court's factual findings were supported by the record. *Id.* at 12a-14a. It concluded that CEH had adequately pursued state remedies. *Id.* at 13a.

Fourth, the court of appeals addressed the County's challenge to Judge Jones' entry of orders on behalf of the bankruptcy court while sitting as a district judge. Pet. App. 15a-16a. Clark County argued that Judge Jones had "exceeded his jurisdiction and violated the separation of powers doctrine by concurrently acting through Article I and Article III courts." C.A. Br. 25-26. The court of appeals acknowledged that the case had a "unique procedural history" but concluded that Judge Jones' actions were not grounds for reversal. Pet. App. 15a-16a.

Finally, the court of appeals addressed the County's claim that Judge Jones had exceeded his jurisdiction when he withdrew the bankruptcy reference and, sitting as a district judge, entered judgment in a case he had

presided over while a bankruptcy judge. Pet. App. 16a-17a. The County contended that this, too, was a "jurisdictional error[]," arguing that it circumvented Congress's design that district courts exercise appellate jurisdiction over bankruptcy court decisions. C.A. Br. 23-25. The court of appeals conceded that "there may have been some abrogation of the County's right to an intermediate appeal," but held that reversal was not required because Judge Jones had "efficiently used judicial resources and minimized further delay." Pet. App. 16a-17a.

2. *The Merits*

The court of appeals then turned to the merits. It first addressed whether the County's actions constituted a taking under the Federal Constitution. Disagreeing with the Nevada Supreme Court's conclusion in *Sisolak*, the court of appeals held that the ordinance did not amount to a federal taking. Pet. App. 18a.

The court of appeals then turned to whether there was a taking under the Nevada Constitution. The court noted that "'a state may place stricter standards on its exercise of the takings power through its state constitution.'" Pet. App. 18a (quoting *Kelo* v. *City of New London*, 545 U.S. 469, 489 (2003)). The court concluded that the Nevada Supreme Court in *Sisolak* had interpreted the state constitution to provide that "Nevadans have a property interest 'in the usable airspace above [their] property up to 500 feet.'" Pet. App. 18a-19a, 22a (quoting 137 P.3d at 1120). Applying that rule from *Sisolak*, the court of appeals concluded that the County's actions constituted a taking under the Nevada Constitution. *Id.* at 19a.

The court of appeals then addressed the issue on which Clark County seeks review. The court rejected the County's argument that federal aviation law preempted the Nevada Supreme Court's construction of the Nevada Constitution. Pet. App. 19a. The court relied on *Janko-*

vich v. *Indiana Toll Road Commission*, 379 U.S. 487 (1965), which involved a similar challenge to height limitations in an airport's approach zone. Pet. App. 20a. In *Jankovich*, as here, the petitioners had claimed that a state court's construction of its state constitutional takings provision was preempted by federal aviation law. *Ibid.* (quoting 379 U.S. at 492). This Court rejected that challenge, concluding that a decision holding the ordinance "invalid as a taking was 'compatible with the congressional policy.'" *Ibid.* (quoting 379 U.S. at 495). In the case below, the court of appeals held that, because "the Supreme Court ha[d] already spoken on a substantially similar issue" in *Jankovich* and "no subsequent Supreme Court authority * * * call[ed] the holding of *Jankovich* into question," federal law did not preempt the Nevada Constitution.

Finally, the court of appeals turned to whether the district court had erred in computing damages by limiting compensation on account of easements respondents had previously granted. Pet. App. 21a-23a. Again relying on *Sisolak*, the court held that the district court had misconstrued the significance of the easements under state law, and remanded for a recalculation of damages. *Ibid.*

ARGUMENT

While this case was pending in the court of appeals, Clark County and McCarran Airport filed a petition for a writ of certiorari raising precisely the issue raised in this petition. See *McCarran Int'l Airport & Clark County* v. *Sisolak*, No. 06-658 (filed Nov. 8, 2006). That petition sought review of the Nevada Supreme Court's decision in *McCarran International Airport* v. *Sisolak*, 137 P.3d 1110 (Nev. 2006), the state-law takings decision that the court of appeals followed here. The first question presented in the *Sisolak* petition is identical to the question presented here. Compare Pet. i with Pet. in No. 06-658,

at i.[3] Authored by the same counsel, on behalf of the same client, the petition there made the same arguments as the petition here. Compare Pet. 15-30 with Pet. in No. 06-658, at 11-22. And that petition was supported by the same group of *amici* that supports this one. *See* Br. of Air Line Pilots Ass'n *et al.* in No. 06-658 (filed Jan. 12, 2007). This Court denied that petition. Nothing warrants a different result here.

To the contrary, as in *Sisolak*, there is no split of authority. Pet. 26. Clark County's assertion of profound national importance is also no more persuasive now than it was then. The court of appeals did nothing more than uphold the Nevada Supreme Court's interpretation of the Nevada State Constitution in a dispute between a Nevada airport and a Nevada landowner. As this Court recognized decades ago in *Jankovich* v. *Indiana Toll Road Commission*, 379 U.S. 487 (1965), that is not a pressing federal issue. Federal aviation law simply does not preclude States from requiring airports seeking to expand to pay just compensation for usable airspace above private property when they appropriate it for public transit.

The primary difference between this case and *Sisolak* is that, in *Sisolak*, the respondent *conceded* that the "federal preemption claim [wa]s not jurisdictionally barred." Br. in Opp. in No. 06-658, at 20. Here, by contrast, there are *five* separate jurisdictional issues the Court would

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[3] The petition in *Sisolak* also asked this Court to review the Nevada Supreme Court's conclusion that the McCarran airport expansion effected a taking under the Federal Constitution. Pet. in No. 06-658, at i, 22-29. As the brief in opposition in *Sisolak* explained, the Court lacked jurisdiction to consider that ruling because the determination that compensation was required also rested on an independent and adequate state ground—that there was a taking under the state constitution. Br. in Opp. in No. 06-658, at 10-15. The brief conceded, however, that the jurisdictional bar did *not* apply to the preemption question—the question again being presented here. *Id.* at 20.

have to address before reaching the merits (issues that Clark County pressed below but does not mention in the petition). If the preemption issue is as important as Clark County contends it is, it will undoubtedly recur in future cases. There is no need for this Court to grant review in a case plagued with vehicle problems.

I. CLARK COUNTY ADMITS THAT THE DECISION BELOW PRESENTS NO SQUARE CIRCUIT CONFLICT

"[T]he absence of any conflict among the Circuits is plainly a sufficient reason for denying certiorari." *Singleton* v. *Comm'r*, 439 U.S. 940, 945 (1978) (Stevens, J., respecting denial of certiorari). Here, Clark County *concedes* that the case "may not reflect [a] 'square' conflict in the circuits." Pet. 26. That is clearly correct: The Ninth Circuit and the Nevada Supreme Court both now agree that the County's preemption claim fails. The absence of any conflict by itself justifies denying review.

A. The Court of Appeals' Decision Is a Straightforward Application of *Jankovich*

The absence of any conflict is not surprising. As the court of appeals noted, this Court "has already spoken on a substantially similar issue" in *Jankovich* v. *Indiana Toll Road Commission*, 379 U.S. 487 (1965). Pet. App. 20a. At issue in *Jankovich* was an airport zoning ordinance that imposed a height restriction to allow takeoff and landing of aircraft. *Id.* at 488. The Indiana Supreme Court ruled that the restriction violated both the Indiana and Federal Constitutions because it was an effort by a municipality "'to take and appropriate to its own use the ordinarily usable airspace of property adjacent to the Gary Airport.'" *Id.* at 489-490, 493 (quoting 193 N.E.2d 237, 241 (1963)). The *Jankovich* petitioners argued in this Court that the state supreme court's reliance on the state constitution was preempted by federal aviation law:

> The federal scheme which the Federal Airport Act embodies is based on the necessity of recourse to airport zoning as a governmental means of regulating land use adjacent to airports for the purpose of maintaining unobstructed aerial approaches. The total nullification of airport zoning worked by the decision below is wholly incompatible with the federal scheme.

Pet. Br. 53-54, in *Jankovich, supra.*

The Solicitor General, in turn, filed an *amicus* brief in *Jankovich* that took direct issue with that argument, stating that federal aviation law did not preclude States from recognizing property rights in the usable airspace immediately above privately owned land. See U.S. Br. as *Amicus Curiae* 2 n.1, in *Jankovich, supra.* The Solicitor General advised the Court that "[t]here is no basis for a contention that federal law removes State law restrictions on the exercise of the zoning power or defeats any State law right to compensation." *Ibid.*

In dismissing the writ as improvidently granted, this Court adopted verbatim the Solicitor General's position that "'there is no basis for a contention that federal law removes State law restrictions on the exercise of the zoning power or defeats any State law right to compensation.'" 379 U.S. at 494 (quoting U.S. Br. 2 n.1). Describing the preemption claim as "insubstantial," the Court held "that the decision of the Supreme Court of Indiana in this case is compatible with the congressional policy embodied in the Federal Airport Act." *Id.* at 494-495 & n.2.[4]

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[4] This Court's ruling accords entirely with its earlier decision in *Griggs* v. *Allegheny County*, 369 U.S. 84 (1962). In *Griggs*, the Court rejected the extreme notion that the meaning of the federal statutory definition of navigable airspace is that landowners cannot have private property rights in airspace below 500 feet if airplanes need

Nothing has happened since *Jankovich* that suggests a different result now. The relevant federal statutory language and FAA regulations are no different today than they were then. Compare 49 U.S.C. § 40102(a)(32) (2006) and 14 C.F.R. § 91.119 (2006) with 72 Stat. 739, 49 U.S.C. § 1301(24) (quoted in *Griggs* v. *Allegheny County*, 369 U.S. 84, 88 (1962)) and 14 C.F.R. § 60.17 (1965) (quoted in *Griggs*, 369 U.S. at 88 n.1). As *Jankovich* makes clear, federal law in no manner limits the authority of States to recognize property rights in the usable airspace immediately above privately owned land and to protect those rights through their state constitutions.

B. The Circuit Cases on Which Clark County Relies Are Inapposite

Despite disclaiming any square circuit conflict (Pet. 26), Clark County cites a handful of cases allegedly "at odds" with the court of appeals' approach. Pet. 27-29. Several were also cited in the *Sisolak* petition. See Pet. in No. 06-658, at 21. They did not justify review in *Sisolak*, and they no more justify review here.

In the first case, *Air Pegasus of D.C., Inc.* v. *United States*, 424 F.3d 1206 (Fed. Cir. 2005), the Federal Circuit rejected a takings claim under the *Federal* Consti-

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that space for takeoff and landing: "But as we said in the *Causby* case, the use of land presupposes the use of some airspace above it. Otherwise no home could be built, no tree planted, no fence constructed, no chimney erected * * *." *Id.* at 88-89. Acknowledging that "[w]ithout the 'approach areas,' an airport is indeed not operable," the Court reasoned that an airport operator must "acquire some private property," and that the airport in *Griggs* "by constitutional standards * * * did not acquire enough." *Id.* at 90. The Court specifically considered the Federal Aviation Act's definition of "navigable airspace" to include "airspace needed to insure safety in take-off and landing of aircraft"—the same definition Clark County relies on here (Pet. 6, 16)—but held that the airport nevertheless had a duty to pay just compensation. See *Griggs*, 369 U.S. at 88-90.

tution after the FAA prohibited commercial helicopter flights in an area of Washington, D.C., that included the plaintiff's heliport. That case had nothing to do with whether federal law would preempt a *State's* recognition, under its *own* constitution, of a right to just compensation for the taking of airspace usable for private development. Nor did the case have anything to do with usable airspace immediately above private land. The plaintiff claimed "not merely a right to access the airspace over its heliport, but a right to access the *navigable airspace from* its heliport"—airspace already in the public domain. *Id.* at 1217 (emphasis added). As a result, the court stated that it would "*not* consider the extent to which Air Pegasus * * * has the right to use non-navigable airspace immediately above its leasehold." *Ibid.* (emphasis added). The case thus did not involve an airport's attempt to appropriate usable airspace immediately above privately owned land for public transit. It involved a challenge to regulations limiting the public's use of what was *already* navigable airspace.

City of Austin v. *Travis County Landfill Co., L.L.C.*, 73 S.W.3d 234 (Tex. 2002), is inapt for similar reasons. That case involved a takings claim under the Federal and Texas Constitutions, which the state court construed to be coextensive. *Id.* at 238-239. Because the court found no taking under either clause, no preemption issue arose.

In *United States* v. *City of New Haven*, 496 F.2d 452 (2d Cir. 1974), the Second Circuit considered a state court *injunction* that *prohibited* a New Haven airport from using airspace over East Haven for takeoff or landing. The case did not involve a takings claim and did not address whether the airport would have to pay just compensation for using East Haven's airspace. To the contrary, the court made clear that it was *only* addressing the *injunction*: "This decision does not in any way preclude East Haven from seeking other remedies that

do not conflict with the Supremacy Clause.'" *Id.* at 454 n.3. In the instant case, CEH merely seeks just compensation for the taking of its private airspace by Clark County's airport expansion; it does not seek to *enjoin* the use of airspace. Although the County claims that requiring it to pay just compensation for airspace "effectively bar[s] such access," Pet. 28, the court in *New Haven* clearly distinguished injunctions from other remedies, 496 F.2d at 454 n.3.

Vorhees v. *Naper Aero Club, Inc.*, 272 F.3d 398 (7th Cir. 2001), is even less relevant. Like *New Haven*, that case addressed an attempt to *enjoin* use of airspace; and like *New Haven*, the court expressly left open the possibility of monetary relief, stating that the claimant was also "free * * * to pursue a takings claim." *Id.* at 405. The Seventh Circuit, moreover, did *not* find *any* conflict with federal aviation law. Contrary to the petition's erroneous assertion (Pet. 28), the Seventh Circuit stated that it would "make no ruling" on whether the plaintiff's claim would be "preempted by the Federal Aviation Act" under conflict preemption principles. *Ibid.*

The cases on which *Vorhees* relied make even more clear that no conflict exists. *Vorhees* cited *Bieneman* v. *City of Chicago*, 864 F.2d 463, 473 (7th Cir. 1988), for the point that "'the state may employ damages remedies * * * to regulate aspects of airport operation over which the state has discretionary authority.'" 272 F.3d at 404. *Bieneman*, in turn, cited "buil[ding] more runways * * * (to the detriment of those under the new ones)" as an example of discretionary state authority. 864 F.2d at 473. And *Bieneman* specifically rejected the argument that damages remedies are necessarily preempted whenever federal aviation law prohibits a State from directly regulating airspace. See *id.* at 472 (citing *Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. 238 (1984)).

Other cases draw that same distinction. In *Krueger* v. *Mitchell*, 332 N.W.2d 733 (Wis. 1983), the court held that the Federal Aviation Act preempted state-law suits for injunctive relief, but not for damages:

> [I]njunctive relief is completely preempted in aviation noise nuisance actions because of the disruptive impact such a remedy would have on air commerce. However, nuisance actions claiming damages only are not preempted by the Act.

Id. at 740; see also *Fiese* v. *Sitorius*, 526 N.W.2d 86, 89-90 (Neb. 1995) (federal law preempts state overflight injunctions, even though landowners may be entitled to just compensation). In short, the federal aviation preemption case law clearly distinguishes between injunctions and damages. For that reason, the *injunction* cases Clark County cites have no bearing on the *damages* issue here. Because there is no conflict, this Court should deny the petition.

C. Clark County's Attempts to Distinguish *Jankovich* Do Not Warrant This Court's Review

Clark County attempts to distinguish *Jankovich*. But its purported distinctions are hardly a compelling basis for this Court's review. Petitioner cites *no* case that has ever accepted the distinctions it now offers.

The purported distinctions lack merit. The County first argues that *Jankovich* is distinguishable because it involved a "traditional takings claim—*i.e.*, that a zoning restriction deprived [the plaintiff] of the *use of its land*." Pet. 24 (emphasis added). Not so: The Indiana Supreme Court held that a "taking requiring compensation—rather than mere regulation—was effected * * * because 'the City of Gary has attempted, by the passage of the ordinance under consideration, to take and appropriate to its own use the *ordinarily usable air space* of property adjacent to the Gary Airport.'" 379 U.S. at 493 (quoting

193 N.E.2d at 241) (emphasis added). That is exactly what the Nevada Supreme Court held in *Sisolak*: "Nevadans have a property interest 'in the *usable airspace* above [their] property * * * .'" Pet. App. 22a (quoting 137 P.3d at 1120) (emphasis added).

Any differences would have no bearing on the question presented. The Indiana Supreme Court found a taking under state law, and this Court held that federal aviation law did not preclude that result regardless of whether there was also a taking under the Federal Constitution. 379 U.S. at 489-495. That holding cannot be squared with Clark County's theory that federal aviation law grants airports the right to use whatever airspace they need for takeoff or landing, so long as they do not effect a *federal* taking. That is true regardless of any differences between the takings claim in *Jankovich* and the takings claim here.

Clark County also attempts to distinguish *Jankovich* on the ground that the petitioners there relied on the Federal Airports Act rather than the Federal Aviation Act. Pet. 25. But no court has ever suggested that the result in *Jankovich* can be avoided merely by citing a different provision of federal aviation law. This Court held broadly in *Jankovich* that "'there is no basis for a contention that *federal law* removes State law restrictions on the exercise of the zoning power or defeats any State law right to compensation.'" 379 U.S. at 494 (emphasis added). The Court also discussed regulations governing the "'acquisition and retention of easements or other interests in or rights for the use of land *or airspace*'" and authorized expenditure of funds for that purpose. *Id.* at 494 (emphasis added). It strains credulity to suggest this Court simply overlooked the supposedly preemptive effect of the statutory definition of "navigable airspace" in reaching that conclusion.

D. Federal Statutes and Regulations Recognize Airports' Duty To Pay Just Compensation Under Federal or Local Law

The absence of any circuit conflict is also unsurprising given that federal law has long recognized that airports have a duty to pay for airspace they appropriate, whether compensation is mandated by federal *or local* law. For instance, the Airport and Airway Improvement Act of 1982 makes removal of hazards to takeoff and landing a condition of federal funds, but provides that funds may be expended for "the acquisition of land or interests therein or easements through or other interests *in airspace*." Pub. L. No. 97-248, §§ 511(a)(4), (a)(5), 513(a)(2), 96 Stat. 324, 671, 687-688, 689 (1982) (emphasis added). Section 10(d) of the Federal Airport Act likewise provides federal funding for the "cost of acquiring land or interest therein or easements through or other interests *in air space*." Ch. 251, 60 Stat. 170, 176 (1946) (emphasis added).

Title 49 of the United States Code includes many other examples. Section 40110(a) provides that the FAA may "acquire * * *, by condemnation or otherwise, an interest in property, *including an interest in airspace* immediately adjacent to and needed for airports and other air navigation facilities owned by the United States Government." (Emphasis added.) Section 47102(3) defines "airport development" to include "[a]cquiring an interest in land *or airspace*." (Emphasis added.) And Section 47125(a) requires the Secretary of Transportation to request other federal agencies "owning or controlling land *or airspace* to convey a property interest in the land *or airspace*" for airport development. (Emphasis added.) These statutes all clearly recognize property rights in airspace and make clear that airports must often pay to acquire those rights.

FAA regulations are to the same effect. A firm condition of federal aid for airport improvements is that "the sponsor must own, acquire, or agree to acquire an adequate property interest in runway clear zones." 14 C.F.R. § 151.11(a)-(d). "[A]n airport operator or owner is considered to have an adequate property interest if it has an easement * * * giving it enough control to rid the clear zone of all obstructions * * * and to prevent the construction of future obstructions." 14 C.F.R. § 151.9(c). While the regulations also recognize the possibility of enacting land use regulations to prevent aviation hazards, the agency expressly acknowledges that such regulations may not be an adequate substitute for acquiring easements because height limitations could be considered "unreasonable in view of current and future foreseeable use of the property" and therefore not "a reasonable exercise of the police power." 14 C.F.R. § 151.11(f). Far from evincing a belief that federal law preempts state property rights in airspace, the FAA treats the question as exclusively one of state law: It requires assurances from the airport operator or owner in the form of a "legal opinion" on the reasonableness of the restrictions. *Ibid.*

Any conceivable doubt is eliminated by official FAA guidance, *Advisory Circular No. 150/5190-4A: A Model Zoning Ordinance to Limit Heights of Objects Around Airports* (Dec. 14, 1987), *available at* www.faa.gov, which clarifies that federal law does *not* preempt state property law in this respect: "Any height limitations imposed by a zoning ordinance must be 'reasonable,' meaning that the height limitations prescribed should not be so low at any point as to constitute a taking of property without compensation *under local law.*" *Id.* at 3 ¶ 5d (emphasis added). Other FAA guidance is in accord. See, *e.g.*, *FAA Discussion Paper on Zoning for Airports* (Sept. 8, 1987), *quoted in* Br. in Opp. in No. 06-658, at 24 n.12 ("As zoning law is individual to each state the state statutes must be

referred to, to determine the extent of zoning authority."); *Advisory Circular No. 150/5100-17: Land Acquisition and Relocation Assistance for Airport Improvement Assisted Projects* § 2-15(c) (Nov. 7, 2005), *available at* www.faa.gov ("Avigation easements are typically acquired for airspace requirements * * * including the approach area * * * ."); FAA, *Land Use Compatibility and Airports*, at I-2 (2005), *available at* www.faa.gov ("While the FAA can provide assistance and funding to encourage compatible land development around airports, it has no regulatory authority for controlling land uses to protect airport capacity."). These authorities are incompatible with the County's interpretation: If States were forbidden from protecting property rights in airspace that would be needed for takeoff or landing under an expansion plan, there would never be any need to consult "local law" to determine whether a taking had occurred.

While the County urges that the Federal Aviation Act defines "navigable airspace" to include airspace "needed to ensure safety in the takeoff and landing of aircraft," 49 U.S.C. § 40102(a)(32), that definition does not address the antecedent question of whether an airport must pay compensation if its expansion plan would *transform* airspace that was *not* "needed to ensure safety in the takeoff and landing of aircraft" into airspace that *is*—effectively converting buildable airspace over private land into airspace open to the public. The statutes and regulations clearly envision that, *before* expansion occurs, the airport must acquire the necessary airspace, paying just compensation when necessary under federal or local law. Only *after* that process has occurred may the airport expand its operations, thereby rendering that airspace "needed to ensure safety in the takeoff and landing of aircraft" and making it part of the navigable airspace. Clark County's contrary interpretation—unsupported by any case, statute, or regulation—ignores the structure of

the statute, yields wholly unreasonable results, and does not remotely present any basis for this Court's review.

II. CLARK COUNTY EXAGGERATES THE IMPORTANCE OF THE DECISION BELOW

Unable to muster a circuit conflict, Clark County urges that the preemption question "will have profound consequences for the continued safe and efficient operation of the nation's air transportation system." Pet. 2. But that grandiose hyperbole overstates the importance of the court of appeals' ruling.

As an initial matter, the court of appeals did nothing more than uphold the Nevada Supreme Court's interpretation of the Nevada State Constitution in a dispute between a Nevada municipal airport and a Nevada landowner. That interpretation has *no* impact on airports in other jurisdictions. Far from being a matter of national significance, this case is fundamentally about Nevada and the extent to which it requires its municipalities to compensate its citizens for property rights taken for airport expansion.

Clark County also exaggerates the scope of the Nevada Supreme Court's rule. That rule does not amount to "protection of an unqualified interest in navigable airspace"; nor does it mean that "any state can nullify the public's federal law right to travel through navigable airspace." Pet. 2, 15. It merely imposes a *precondition* to airport expansions that would make otherwise private airspace into public navigable airspace in the first place.

Even under the Federal Constitution, airports must often pay just compensation when they seek to expand. See, *e.g.*, *Griggs* v. *Allegheny County*, 369 U.S. 84 (1962); *United States* v. *Causby*, 328 U.S. 256 (1946). As shown above, pp. 19-21, *supra*, payment for airspace is a central feature of the federal regime. For those reasons, the

Nevada Supreme Court's ruling does not force Nevada airports to do anything other airports do not already do.

Clark County also overstates the decision's financial significance. Although it insists the decision threatens it with $10 *billion* of liability (Pet. 19), that figure has no support anywhere in the record. The judgment in this case was for only $10 million (before the remand). Pet. App. 9a. If that judgment threatened the County with liability exceeding $10 billion, the County surely would have said so previously. But it did not. Besides, as noted above, p. 5, *supra*, Clark County established a $60 million budget line-item for acquiring property including Vacation Village. C.A. S.E.R. 100, 104-106, 119-124. No harm will result to the national air transportation system if Clark County pays funds it obtained with FAA approval to compensate CEH for the full losses CEH suffered.

More than forty years ago, the petitioners in *Jankovich* offered the same doomsday scenario in the aftermath of the Indiana Supreme Court's decision there. They warned that "the inevitable consequence" of the decision would be "financially prohibitive" liability that would "price[] airports out of existence in Indiana" and "cripple[]" the national transportation system. See Pet. Br. 54-55, in *Jankovich*, *supra*. That prophecy, however, was not realized. The Nation's air transportation system and the State of Indiana are doing well. There is no plausible basis for supposing that Clark County's exaggerated rhetoric has any more credibility today than the *Jankovich* petitioners' did in 1965.

III. THIS CASE IS A POOR VEHICLE TO REACH THE QUESTION PRESENTED

Even if the question presented were of national importance—and it is not—this case would plainly be an inadequate vehicle to address it. There are multiple jurisdictional issues that this Court would have to traverse

before reaching the question on which petitioner seeks review. That alone justifies denying review. If the question presented truly is the $10 billion issue Clark County contends it is, it will arise again in other cases that are not plagued by the obvious vehicle problems that would impede this Court's review here.

A. Multiple Threshold Jurisdictional Issues Make This Case an Inadequate Vehicle

Although nowhere mentioned by the petition, the court of appeals' opinion begins by addressing *five* separate jurisdictional issues. Pet. App. 9a-17a. This Court would likewise have to address those five issues before it could reach the question presented. As Clark County observed below, "Article III * * * requires that every federal court 'satisfy itself of its jurisdiction over the subject matter before it considers the merits of a case.'" C.A. Br. 14 (quoting *Ruhrgas AG* v. *Marathon Oil Co.*, 526 U.S. 574, 583 (1999)). The County characterized each of those five threshold issues as "jurisdictional" below, *id.* at 14-26, and the court of appeals agreed, describing them as "challenges to the existence and exercise of jurisdiction in this case," Pet. App. 9a. Those jurisdictional issues make this case a much worse vehicle than *Sisolak*, where this Court denied review even though everyone *agreed* that the "federal preemption claim [wa]s not jurisdictionally barred." Br. in Opp. in *Sisolak*, No. 06-658, at 20; see also p. 11, n.3, *supra*.

Clark County does not, and cannot, claim that any of those issues is independently worthy of review. And surely the County, which pressed each of the five jurisdictional challenges below, cannot now claim they are so insubstantial that they present no meaningful barrier to review. The need to wade through nearly a half-dozen jurisdictional issues before reaching the merits weighs dispositively against certiorari.

1. *Ripeness*

Clark County first argued below that federal jurisdiction was lacking because CEH's takings claim was unripe. Generally, a takings claim is unripe until the relevant governmental entity has reached a final decision regarding the property at issue, and the landowner has sought compensation through the procedures the state has provided. See *Williamson County Regional Planning Comm'n* v. *Hamilton Bank*, 473 U.S. 172, 186, 194 (1985). The County argued below that CEH had failed to exhaust state procedures, citing *Cowell* v. *Palmer Township*, 263 F.3d 286, 291 (3d Cir. 2001), for the proposition that adjudication of takings claims "in federal bankruptcy court is not an appropriate alternative to the state inverse condemnation procedures." C.A. Br. 16.

The court of appeals relied on circuit precedent holding that, where a takings claim involves a physical invasion of property, the finality element is "'automatically satisfied at the time of the physical taking.'" Pet. App. 12a. The court further held that, regardless of whether the taking was a physical invasion under federal law, the Nevada Supreme Court's characterization governed the state takings claim. *Ibid.* As to exhaustion, the court of appeals examined Nevada case law and determined that an inverse condemnation lawsuit was an appropriate remedy. *Id.* at 14a. The court further held that litigation of the claim in bankruptcy court did not change that result because the claim was there only by virtue of removal. *Ibid.* Respondents agree with that analysis. But the necessity of revisiting each step of that ripeness analysis—some of which are specific to Nevada law—before this Court could even reach the question presented weighs strongly against granting the petition.

2. *Rooker-Feldman*

Clark County also invoked the *Rooker-Feldman* doctrine, another limitation on subject-matter jurisdiction that a federal court is obligated to address. See *Exxon Mobil Corp.* v. *Saudi Basic Indus. Corp.*, 544 U.S. 280, 291 (2005). *Rooker-Feldman* bars district courts from reviewing prior state-court decisions. *Id.* at 284. In the court of appeals, Clark County claimed that, by the time CEH had filed its notice of removal, the state court had already ruled that it would dismiss for failure to bring claims to trial within the five-year period prescribed by Nevada law. C.A. Br. 19 (citing Nev. R. Civ. P. 41(e)). The County argued that, "although the bankruptcy court agreed with the state court that the automatic bankruptcy stay did not apply to the Landowners' claims" and "expressed concerns about violating the *Rooker-Feldman* doctrine," it "entered an order lifting the nonexistent stay so [CEH] could proceed with removal and escape dismissal." C.A. Br. 19. According to the County, this "collateral attack on the state court's ruling was a patent violation of *Rooker-Feldman*." *Ibid.*

The court of appeals read the record differently. It understood the state court to have indicated only that it "*would* dismiss the case *if and when* the statute of limitations * * * expired." Pet. App. 10a. Because that ruling was not sufficiently final, *Rooker-Feldman* did not apply. *Ibid.* The prospect of having to review that record-specific analysis also clearly weighs against review.

3. *Bankruptcy Jurisdiction*

Under 28 U.S.C. § 1334(b), bankruptcy courts have jurisdiction over "civil proceedings arising under title 11, or arising in or relating to cases under title 11." The Ninth Circuit has held that a closer nexus must exist to establish jurisdiction under the "relating to" prong where a reorganization plan has already been confirmed. See

In re Pegasus Gold Corp., 394 F.3d 1189, 1193 (9th Cir. 2005). Under that rule, it is not sufficient that the case "could conceivably increase the recovery to the creditors"; the action must "affect the implementation and execution of the Plan itself." *Id.* at 1194 n.1.

In this case, Clark County argued that jurisdiction was lacking because the inverse condemnation claim at issue here had no effect on the implementation or execution of the confirmed Chapter 11 plan. C.A. Br. 20-22. The court of appeals rejected that argument because the inverse condemnation claim was property of the bankruptcy estate. Pet. App. 11a. According to the court of appeals, claims that are property of the estate are "related to" the bankruptcy under 28 U.S.C. § 1334(b) "without further scrutiny." *Ibid.* (citing *Celotex Corp.* v. *Edwards*, 514 U.S. 300 (1995)). Whether the Ninth Circuit properly articulated the scope of bankruptcy jurisdiction is similarly a threshold issue that plainly does not warrant this Court's attention but that this Court would nevertheless have to address before reaching the question presented.

4. *Withdrawal of the Reference*

Judge Jones tried the case as a bankruptcy judge but was then elevated to the district court, where he withdrew the reference and entered judgment as a district judge. The County's fourth jurisdictional challenge questioned Judge Jones' authority to withdraw the reference in that manner. Pet. App. 16a-17a. Although district courts have authority to withdraw a bankruptcy court reference, withdrawal at a late stage in proceedings raises distinct issues. District courts have appellate jurisdiction over bankruptcy court decisions. 28 U.S.C. § 158. Some courts have indicated that belated withdrawal may effectively "derail[] the appellate process provided by statute." *In re Pruitt*, 910 F.2d 1160, 1167-

1168 (3d Cir. 1990). This case presents the additional unique circumstance that the district judge who withdrew the reference was also the bankruptcy judge who presided over the trial. The County argued below that the withdrawal prevented it from appealing two specific interlocutory rulings—the "unauthorized lifting of a non-existent stay" and the "denial of its motion to remand." C.A. Br. 24-25.

After examining a number of relevant factors, the court of appeals held that Judge Jones' withdrawal of the reference did not require reversal because he had "efficiently used judicial resources and minimized further delay." Pet. App. 16a-17a. That ruling presents a host of subsidiary issues that this Court would have to address before reaching the question presented—most of which have no significance beyond the unique procedural history of this case.[5] That too counsels against review.

5. *Separation of Powers*

The final jurisdictional issue relates to Judge Jones' continued entry of orders for the bankruptcy court—including the dispositive findings of fact and conclusions of law—after his elevation to the district court. Pet. App. 15a-16a. Below, the County argued that Judge Jones had "exceeded his jurisdiction and violated the separation of powers doctrine by concurrently acting through Article I and Article III courts." C.A. Br. 25-26.

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[5] Those issues include: (1) whether 28 U.S.C. § 158 or any other law limits withdrawal of a bankruptcy court reference and, if so, when; (2) whether withdrawal of the reference in this case abrogated Clark County's right to appeal any interlocutory ruling and, if so, whether that requires reversal; (3) whether the efficiency considerations cited by the court of appeals are a sufficient basis to support the withdrawal; and (4) whether the fact that the district judge who withdrew the reference was also the bankruptcy judge who presided over the trial affects the analysis.

The court of appeals rejected that argument because the County had cited "no authority for the proposition that Judge Jones's entering of findings of fact signed as a bankruptcy judge following his confirmation as an Article III judge constituted reversible error." Pet. App. 16a. It acknowledged that *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 457 U.S. 50 (1982), precluded bankruptcy judges from exercising Article III powers. Pet. App. 16a. According to the court of appeals, however, that case was inapposite because it involved the "opposite problem"—Article I judges exercising Article III powers rather than vice versa. Whatever the merits of that holding, this Court would have to address it too in order to assure itself that it had jurisdiction to reach the question presented.[6]

B. The Federal Takings Claim Presents an Alternative Ground for Affirmance

Finally, this case is an unsuitable vehicle because the County's actions also effected a taking under the Federal Constitution. That federal taking presents an alternative ground for affirmance that renders the preemption question irrelevant.

Clark County concedes that, under *United States* v. *Causby*, 328 U.S. 256 (1946), a federal taking can occur if overflights are "'so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land.'" Pet. 16 (quoting 328 U.S. at 265-266). That is precisely what the bankruptcy court found here. The court cited *Causby* for the proposition that overflights "must pose a direct, substantial, and immediate interference with the enjoyment and use of the land," other-

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[6] Further, although the County and the court of appeals characterized all five issues as jurisdictional, see C.A. Br. 16-25; Pet. App. 9a, that characterization is not entirely clear for every issue. This Court would have to confront that preliminary question as well.

wise "there can be no taking." Pet. App. 52a. Applying that federal standard, the court made a factual finding that "Vacation Village has shown that the increased frequency of flights of large general aviation aircraft over its property, below the 20:1 avigation easement, directly, substantially, and immediately interfered with the enjoyment and use of its property." *Id.* at 54a. The overflights reduced the market value of CEH's land from $10 per square foot to $5.50 per square foot, which was the basis for the $10 million award. *Id.* at 27a.[7] Those findings are sufficient to establish a federal taking under *Causby*.

The court of appeals rejected the federal takings claim in a single paragraph, Pet. App. 18a, but it did not cite *Causby*, nor did it claim that the bankruptcy court's factual findings were clearly erroneous. A "[r]espondent may * * * defend the judgment below on any ground which the law and the record permit, provided the asserted ground would not expand the relief which has been granted." *Smith* v. *Phillips*, 455 U.S. 209, 215 n.6 (1982). Here, the bankruptcy court made factual findings that, even on petitioner's account, establish a federal taking under *Causby*.

The preemption question on which Clark County seeks review is only properly presented in a case where there is a state-law taking but no federal taking. Flying large planes at low altitude over commercial property in a way that substantially reduces the market value of the land is a taking under either the federal or state constitution. That, too, makes this a wholly unsuitable vehicle for review.

CONCLUSION

The petition for a writ of certiorari should be denied.

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[7] Although the Ninth Circuit remanded for a recalculation of damages, Pet. App. 21a-23a, a hypothetical future damages award cannot be a proper basis for granting review.

Respectfully submitted.

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IN THE

Supreme Court of the United States

CLARK COUNTY, A POLITICAL SUBDIVISION OF THE STATE OF NEVADA,

Petitioner,

v.

VACATION VILLAGE, INC., CEH PROPERTIES, LTD., TIMOTHY S. HEERS, TERRIE HEERS THOMPSON, CHERYL D. NOLTE, GARY R. HEERS, AND CATHLEEN HEERS NORCOTT,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
REPLY BRIEF OF PETITIONER	1
CONCLUSION	10

TABLE OF AUTHORITIES

CASES — Page

Air Pegasus of D.C., Inc. v. *United States*, 424 F.3d 1206 (Fed. Cir. 2005) 7
Celotex Corp. v. *Edwards*, 514 U.S. 300 (1995)..... 10
County of Clark v. *Hsu*, No. 38853, 2004 WL 5046209 (Nev. Sept. 30, 2004)..... 6
Jankovich v. *Ind. Toll Road Comm'n*, 379 U.S. 487 (1965)..... 2, 3, 4
McCarran Int'l Airport v. *Sisolak*, 137 P.3d 1110 (Nev. 2006), *cert. denied*, 127 S. Ct. 1260 (2007)..... 1
Miller v. *French*, 530 U.S. 327 (2000)..... 5
Sosna v. *Iowa*, 419 U.S. 393 (1975)..... 9
Verizon Md., Inc. v. *Pub. Serv. Comm'n*, 535 U.S. 635 (2002)..... 9

STATUTES

Pub. L. No. 88-280, 78 Stat. 158 (1964) (codified at 49 U.S.C. § 47107(a)(10)) 4, 6
28 U.S.C. § 1334(b)..... 10

LEGISLATIVE HISTORY

S. Rep. No. 88-446 (1963) 6
H.R. Doc. No. 76-245 (1939)..... 5

OTHER AUTHORITY

President's Airport Comm'n, *The Airport and its Neighbors* (May 16, 1952)..... 6

SCHOLARLY AUTHORITY

Erwin Chemerinsky, *Federal Jurisdiction* (4th ed. 2003)..... 9

REPLY BRIEF OF PETITIONER

Respondents' opposition is predicated on a persistent misstatement of the issue in this case. The issue is not whether federal law bars States "from recognizing property rights in the usable airspace *immediately above*" private land, Opp. at 13 (emphasis added); see also *id.* at 14, and requiring compensation when such airspace "is *appropriated* for public transit use," *id.* at 1 (emphasis added), see also *id.* at 11. The issue is whether a State can, consistent with federal law, grant ownership of *the first 500 feet* of navigable airspace above private land, and confer a *per se* right to compensation for height restrictions that do *not* "appropriate" property under the federal constitution because they allow economically beneficial use of the underlying land. This issue was not presented or addressed in *Sisolak* or *Jankovich*. Nor can federal law and regulations co-exist with this extraordinary state-law right to compensation, which undermines the careful balance Congress has struck between ensuring a safe and cost-effective national aviation system and protecting the rights of property owners near airports. The untoward effects that such state law interference will have on the national aviation system is more than sufficient to justify this Court's review. The "jurisdictional" issues respondents identify do not militate against review of this profoundly important issue.

1. The issue raised by this case is not, and indeed cannot be, "precisely the same" as that raised in *McCarran International Airport* v. *Sisolak*, No. 06-658 (filed Nov. 8, 2006) ("*Sisolak* Pet."). In *Sisolak*, the Nevada Supreme Court held that Ordinance 1221 caused a taking under *both* the federal and state constitutions. *McCarran Int'l Airport* v. *Sisolak*, 137 P.3d 1110, 1124 (Nev. 2006) ("We agree with Sisolak that, under the United States and Nevada Constitutions, the ordinances authorize the permanent physical invasion of his airspace."), *cert. denied*, 127 S. Ct. 1260 (2007). Accordingly, *Sisolak* did not raise the issue whether federal law preempts "a state constitutional right to compensation for

public use of navigable airspace *that causes no federally cognizable deprivation*" of property. Pet. at 18 (emphasis added).[1]

In *Sisolak*, moreover, the Nevada Supreme Court never addressed any question of preemption, let alone the issue posed where, as here, an ordinance is found to cause a taking under state, but not federal, law. In the decision below, by contrast, the Ninth Circuit resolved this very issue, ruling that federal law allows States to adopt more stringent takings restrictions than the Fifth Amendment imposes on airport zoning, and to require compensation for any regulation of the first 500 feet of navigable airspace. Pet. App. 18a-20a. Thus, the lower court did not merely "uphold the Nevada Supreme Court's interpretation of the Nevada State Constitution," Opp. at 11; it decided an important issue of federal preemption.

This Court could not have deemed this preemption claim "insubstantial," Opp. at 12-13, in *Jankovich* v. *Indiana Toll Road Commission*, 379 U.S. 487 (1965), because *Jankovich* involved an entirely different claim. The petitioners there argued that the Airport Act *mandated* airport zoning and thus preempted state-law nullification of such zoning power. See Br. for Ptrs. at 53-54, in *Jankovich* (filed Oct. 9, 1964) ("nullification of airport zoning" is "wholly incompatible with the federal scheme," which "is based on the *necessity* of recourse to airport zoning") (emphasis added), *available at* 1964 WL 81275. The Solicitor General disagreed with this different preemption argument, stating that federal law merely assumed the existence of local zoning authority, but neither mandated such authority nor overrode all state restrictions on it. Mem. for the United States as *Amicus Curiae* at 2 n.1, in *Jankovich* (filed Nov. 18, 1964) ("U.S. *Jankovich* Br.") (although the "Airport Act assumes that 'local power to zone

[1] Accordingly, petitioner raised the different issue of whether federal law "precludes recognition under state law of private ownership of federally defined navigable airspace." *Sisolak* Pet. at 12 (capitalization altered).

exists,' . . . . [t]here is no basis for a contention that federal law removes State law restrictions on the exercise of the zoning power or defeats any State law right to compensation").

The balance of the Solicitor General's brief, which respondents ignore, makes clear that the government did not believe federal law could co-exist with state laws that require compensation for height restrictions that cause no federal taking. The government stated that, "[b]ecause cost is a factor[,] . . . local authorities should be encouraged to restrict the use of land surrounding airports by appropriate zoning laws, which, of course, include height limitations." *Id.* at 3. Although "ownership of real property includes ownership of 'the immediate reaches of the superadjacent airspace,'" the government explained, "it does not follow. . . that this right is absolute and not subject to reasonable regulation." *Id.* at 8-9 (quoting *United States* v. *Causby*, 328 U.S. 256, 266 (1946)). To the contrary, reasonable airport zoning is constitutionally permissible, "*even though it deprives the neighboring landowner without compensation of some part of the ordinarily usable airspace above his property.*" *Id.* at 11 (emphasis added). This discussion makes no sense if, as respondents claim, the government thought States could recognize private rights in navigable airspace well beyond the "immediate reaches of the superadjacent airspace" and could compel payment for the same type of "reasonable airport zoning" the government deemed constitutionally permissible.[2]

Nor did this Court hold that federal law "in no manner limits" state constitutional protection of ownership rights in navigable airspace. Opp. at 14. The Court rejected the preemption argument in *Jankovich* because, contrary to the petitioners' claim in that case, the state decision did not signify "total nullification of airport zoning." 379 U.S. at 493

[2] The government's analysis in *Jankovich* is consistent with its most recent statements on the subject in *Breneman* v. *United States*. *See* Pet. at 29.

(opinion below "does not portend the wholesale invalidation of all airport zoning law"). The Court went on to state that "no substantial claim can be made that Congress intended to preclude such an application of state law *as is involved in the present case*." *Id.* at 494 (emphasis added). This is a case-specific ruling, and not, as respondents argue, a blanket rejection of all federal challenges to state constitutional protection of airspace rights. As petitioners have shown, Pet. at 24-25, the "application of state law . . . involved in" *Jankovich* resulted in recognition of a taking that would have been cognizable under federal law, because the 18-foot height limit prevented use of respondents' 30-foot high toll road. *Jankovich*, 379 U.S. at 488, 494; U.S. *Jankovich* Br. at 11 (landowner defended the judgment "only on the ground that, *as applied to its road*, the zoning ordinance effected an unconstitutional taking") (emphasis added). It is absurd to claim that the differences between the restriction in *Jankovich*, which denied *all* use of a toll road, and Ordinance 1221, which permits operation of a 315-room hotel-casino, "have no bearing," Opp. at 18, on *Jankovich*'s case-specific preemption analysis.

Respondents' claim that the Court considered the Aviation Act when conducting that analysis, *id.*, is equally baseless. The definition of "navigable airspace" was utterly irrelevant to the claim that federal law mandated local zoning, and the *Jankovich* petitioners thus did not cite that definition or the Aviation Act as the source of that mandate. See Br. for Ptrs. at 53, in *Jankovich* ("the federal scheme which the *Federal Airport Act* embodies is based on the *necessity* of . . . airport zoning") (emphases added).[3]

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[3] The petitioners cited the Aviation Act only once, 30 pages earlier, to show the authority of the Federal Aviation Administration ("FAA") to protect airport approach zones. Br. for Ptrs. at 24 n.14, in *Jankovich*. The Sponsor Assurance that the Court cited in *Jankovich*, 379 U.S. at 494, was derived from the Airport Act, not the Aviation Act. *See* Pub. L. No. 88-280, § 10, 78 Stat. 158 (1964) (codified as amended at 49 U.S.C. § 47107(a)(10)).

In short, *Jankovich* never addressed whether the Aviation Act and its implementing regulations preempt a *per se* state constitutional right to compensation whenever an ordinance regulates use of the first 500 feet of navigable airspace, even when the ordinance permits economically beneficial use of the underlying land and causes no federal taking. Indeed, if *Jankovich* did dismiss this preemption claim, it should be overruled, as such a state-law right plainly frustrates the purposes of these federal laws. See *infra*; see also Br. of Air Line Pilots Ass'n as *Amicus Curiae* in Support of Pet. ("ALPA Br.") at 10.

2. In their effort to show otherwise, respondents cite statutory and regulatory provisions that contemplate that airports will purchase airspace needed for safe flight, and permit use of federal funds for that purpose. Opp. at 19-22. But these provisions simply reflect Congress's recognition that the public's right of transit cannot trump the rights of landowners when overflights, or zoning restrictions designed to ensure their safety, cause a *federal* taking—a recognition courts would presume even without such express statutory language. See *Miller* v. *French*, 530 U.S. 327, 341 (2000). The fact that Congress understood that some land use restrictions would cause federal takings, and authorized use of federal funds to purchase property interests to avoid them, does not demonstrate that it intended to allow states to recognize *per se* rights to compensation for airport zoning restrictions that permit economically beneficial use of underlying land and cause no federal taking.

To the contrary, Congress and the Executive Branch have repeatedly recognized that airports cannot protect the public safety simply by purchasing property and airspace, because doing so is too expensive. "To purchase outright enough land to make the protection complete would often require that the acreage needed for the landing area proper be multiplied by five or more." Civil Aeronautics Administration, Airport Survey, H.R. Doc. No. 76-245, at 33 (1939). "The cost of

acquisition of sufficient land . . . is frequently beyond the capabilities of a single community." President's Airport Comm'n, *The Airport and its Neighbors* 8 (May 16, 1952). Thus, when Congress amended the Airport Act to require assurance that "appropriate action, including the adoption of zoning laws," is taken, "to the extent reasonable, to restrict the use of land adjacent to or in the immediate vicinity of the airport," Pub. L. No. 88-280, § 10, 78 Stat. 158 (codified as amended at 49 U.S.C. § 47107(a)(10)), it plainly intended zoning laws to be used instead of such prohibitive acquisitions. Indeed, the Senate Committee explained that it "has no intention of allowing airports to be priced out of existence." S. Rep. No. 88-446, at 24 (1963).

Yet that is what will happen under the Ninth Circuit's ruling. Petitioner conservatively estimates that its liabilities under *Sisolak*'s *per se* standard could total $10 *billion*.[4] There are over 3,554 acres within a 20,000-foot radius of the airport that are subject to height limits, see ALPA Br. at 7, and the judgments here and in *Sisolak* were in the millions of dollars. If only a modest percentage of the numerous nearby landowners bring *Sisolak* claims, petitioner's liabilities will quickly reach crushing levels.[5] Nor can respondents dispute the harmful effects that such massive liabilities, or the service

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[4] This estimate is not in the record, Opp. at 23, because, when the case was tried, the Nevada Supreme Court had *rejected* the very type of takings claim at issue here. *See County of Clark* v. *Hsu*, No. 38853, 2004 WL 5046209 (Nev. Sept. 30, 2004) (unpublished). *Sisolak* was not announced until this case was on appeal, and the record was closed.

[5] Petitioner never proposed to spend funds from passenger facility charges to buy respondents' airspace, as respondents misleadingly claim, Opp. at 5, 23. Rather, petitioner proposed to spend $60 million to buy two parcels of land within the runway protection zone ("RPZ"). Only 1.25 acres of respondents' land fell within the RPZ. Petitioner did not purchase this land because it could be used in various ways (*e.g.*, as a parking lot) that are compatible with zoning for the RPZ, and both courts concluded there was no taking of this property. Pet. App. 23a-24a. Nor did petitioner purchase the other property within the RPZ; it was developed as a golf course, which is also compatible with zoning for the RPZ.

reductions necessary to avoid them, will have on the national aviation system as a whole. See Pet. at 19-22; ALPA Br. at 20 (describing ripple effects on "airport operators in neighboring States"). Thus, petitioner is not positing the type of groundless "doomsday scenario" predicted in *Jankovich*, Opp. at 23, where the petitioners mistakenly believed that the state court had declared all airport zoning void. The potential liabilities created by *Sisolak*'s *per se* standard are very real, as are the magnitude of the harms they threaten to McCarran and the larger aviation system as a whole.

Sisolak's *per se* takings standard therefore plainly frustrates the Aviation Act's goals of ensuring economical and safe air transportation. To achieve these goals, federal law places hundreds of feet of navigable airspace needed for safe takeoff and landing in the public domain, Pet. at 6, 16, requires local governments to eliminate flight hazards around airports, and encourages them to do so using zoning restrictions because of their cost advantages. See U.S. *Jankovich* Br. at 3. Yet *Sisolak* recognizes private ownership of this same airspace and compels Nevada airports to pay massive *per se* takings liabilities for using the types of zoning restrictions Congress encourages, when those restrictions do not deprive affected land of economically beneficial use. Thus, Nevada airports are forced to do something that "other airports do not already do," Opp. at 23—they must purchase the public's right to use airspace that is not privately owned within the meaning of the federal takings clause, and that Congress has already permitted the public to use.[6]

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[6] The extraordinary nature of this requirement is confirmed by various federal and state cases that have rejected claims of private ownership of the navigable airspace, or use of state law impediments to its use. *See* Pet. at 26-29. Respondents offer various factual distinctions, Opp. at 14-17, that simply confirm what petitioner itself acknowledged—these cases do not conflict "squarely" with the decision below. These distinctions, however, cannot obscure the fundamental point: Nevada's *per se* takings standard is inconsistent with the principle that "[p]rivate property interests simply do not, as a general matter, exist in the navigable airspace," *Air*

Ultimately, respondents claim that the best evidence that Congress meant to allow States to create such interference with safe and efficient air travel is an FAA circular, which states that "'height limitations . . . should not be so low at any point as to constitute a taking of property without compensation *under local law*.'" *Id.* at 20 (emphasis in original) (quoting Advisory Circular No. 150/5190-4A, *A Model Zoning Ordinance to Limit Heights of Objects Around Airports* (1987)). But the phrase "local law" is plausibly read to refer to local zoning laws that *cause* a taking, not to state constitutions that determine when a taking occurs. Indeed, it is odd to call state constitutions "local law," and unlikely that the FAA was concerned only with state, not federal, takings. In all events, the FAA could not have been referring in 1987 to the type of unprecedented state takings recognized in *Sisolak*, where any restriction below *500 feet* is considered "so low" as to cause a taking. In short, this one sentence in non-binding guidance cannot show that Congress intended to allow States to impose *per se* takings liabilities for use of the very zoning restrictions it has long encouraged local governments to use—*i.e.*, height restrictions that permit economically beneficial use of underlying land and thus cause no federal taking. If the Court has "[a]ny conceivable doubt," *id.*, as to the preemptive force of the Aviation Act and its implementing regulations, it should call for the views of the United States, rather than rely on respondents' self-serving views.

3. In a final desperate effort to prevent review, respondents assert that this case is a poor vehicle because petitioner made a number of preliminary challenges below. The two courts below considered and decided these questions, with both courts concluding that there are no jurisdictional or other barriers to entertaining the merits of respondents'

Pegasus of D.C., Inc. v. United States, 424 F.3d 1206, 1219 (Fed. Cir. 2005), except where use of such airspace is necessary to ensure that the underlying land can be put to some economically beneficial use.

takings claim in federal court. These routine issues impose no obstacle for this Court to reach the critical question of federal preemption presented by this petition.

Two of the issues respondents describe equivocally, *id.* at 29 n.6, as "jurisdictional" plainly are not. Namely, respondents contend that federal subject matter jurisdiction is in doubt on two fronts because one of the judges who heard the case below sat both as the bankruptcy judge and then as the district court judge. *Id.* at 27-29. However, "[s]ubject matter jurisdiction is the legal authority of a *court* to hear and decide a particular type of case." Erwin Chemerinsky, *Federal Jurisdiction* § 5.1, at 259 (4th ed. 2003) (emphasis added). Thus, this one *judge's* actions—unique as they were—could not divest the bankruptcy and district *court* of "legal authority" to hear this case. At most, his conduct implicated the non-jurisdictional question whether it was appropriate for one judge to have considered the case in both forums. Petitioner, however, does not press this argument here so it is waived. See *Sosna* v. *Iowa*, 419 U.S. 393, 398 (1975) (parties may waive non-jurisdictional defects).

Nor will the remaining issues hinder this Court's review. First, petitioner relied on Ninth Circuit law to argue that the *Rooker-Feldman* doctrine protects non-final state rulings from collateral federal attack, but the court below rejected this reading of its caselaw. Pet. App. 10a. As nothing in this Court's jurisprudence is to the contrary, see *Verizon Md., Inc.* v. *Pub. Serv. Comm'n*, 535 U.S. 635, 644 n.3 (2002) (*Rooker-Feldman* "merely recognizes that 28 U.S.C. § 1331 is a grant of original jurisdiction, and does not authorize district courts to exercise appellate jurisdiction over state-court judgments"), the issue is not presented by petitioner and has no remaining relevance.

Second, in challenging the ripeness of the takings claims, petitioner argued that respondents had failed to exhaust their state inverse condemnation remedy before they removed their claims to bankruptcy court. The Ninth Circuit *agreed* that

respondents were obligated to exhaust these remedies; it held, however, that respondents had not abandoned their state inverse condemnation claims and instead had simply continued adjudicating them in a new forum, *i.e.*, bankruptcy court. Pet. App. 14a. Petitioner does not dispute this disposition of its ripeness challenge, and that disposition raises no impediment to this Court's review of the preemption issue raised by this case.

Finally, petitioner challenged the bankruptcy court's conclusion that respondents' takings claims were "related to" the bankruptcy proceedings within the meaning of 28 U.S.C. § 1334(b) because they could "conceivably" affect the bankruptcy estate; petitioner argued that the proper "effect" test was whether the claims would affect implementation of the plan of reorganization. Applying *Celotex Corp.* v. *Edwards*, 514 U.S. 300 (1995), the Ninth Circuit ruled that the "effect" test applied only to suits between third parties; causes of action owned by the debtor—such as respondents' takings claims—necessarily satisfy the "related to" requirement. Pet. App. 11a. As petitioner did not challenge "related to" jurisdiction under this separate "related to" prong, the Ninth Circuit's straightforward application of that prong raises no hurdle to review.

At bottom, respondents' game of jurisdictional "gotcha" provides no basis for denying review of the pressing issue of federal preemption presented by this case. In fact, as *amici* have stressed, this case is an ideal vehicle, because it presents the issue in unusually stark terms, given the Ninth Circuit's finding that there was no federal taking. ALPA Br. at 7-8.[7]

CONCLUSION

For all the foregoing reasons and those set forth in the petition, the petition for a writ of certiorari should be granted.

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[7] In light of that finding, respondents' suggestion that there was a federal taking, Opp. at 29-30, is baseless.

Respectfully submitted,

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5-23-08

No. 07-373

In the Supreme Court of the United States

CLARK COUNTY, NEVADA, PETITIONER

v.

VACATION VILLAGE, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Respondents are the former owners of land near McCarran International Airport in Nevada. They filed suit against petitioner, the airport operator. Respondents contended that newly-enacted restrictions on the height of structures that could be erected on their property, designed to facilitate the use of airspace above their land for takeoff and landing of aircraft, constituted a taking of their property that required the payment of just compensation. The court of appeals held that the restrictions did not effect a compensable taking under federal standards, but that respondents had established a compensable taking under Nevada law, and that federal aviation statutes do not preempt that state-law compensation requirement. The question presented is as follows:

Whether federal law preempts the state-law award of just compensation ordered by the court of appeals in this case.

TABLE OF CONTENTS

Page

Statement 1
Discussion 7
A. States are generally free to accord protections under their state constitutions that are more extensive than the federal Constitution requires 7
B. Petitioner's broad preemption theory cannot be reconciled with this Court's decision in *Jankovich* 9
C. Although state-law restrictions on airport zoning might under some circumstances raise significant preemption concerns, this case is not a suitable vehicle for determining the applicable limits on state authority 13
D. Petitioner has failed to demonstrate that the state-law compensation requirement applied in this case will disrupt the federal aviation regime 18
Conclusion 23

TABLE OF AUTHORITIES

Cases:

AOPA v. *FAA*, 600 F.2d 965 (D.C. Cir. 1979) 3
Braniff Airways, Inc. v. *Nebraska State Bd. of Equalization & Assessment*, 347 U.S. 590 (1954) 12
Brown v. *Legal Found.*, 538 U.S. 216 (2003) 16, 17
Cooper v. *California*, 386 U.S. 58 (1967) 8
Danforth v. *Minnesota*, 125 S. Ct. 1029 (2008) 8
Delaware v. *Prouse*, 440 U.S. 648 (1979) 8

Cases—Continued: Page

Geier v. *American Honda Motor Co.*, 529 U.S. 861 (2000) 9
Griggs v. *Allegheny County*, 369 U.S. 84 (1962) 2
Indiana Toll Rd. Comm'n v. *Jankovich*, 237 N.E.2d 237 (Ind. 1963) 9
Jankovich v. *Indiana Toll Rd. Comm'n*, 379 U.S. 487 (1965) ..... *passim*
Kelo v. *New London*, 545 U.S. 469 (2005) 8
Loretto v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) 6
McCarran Int'l Airport v. *Sisolak*, 137 P.3d 1110 (Nev. 2006), cert. denied, 127 S. Ct. 1260 (2007) ..... *passim*
Michigan v. *Long*, 463 U.S. 1032 (1983) 8
Skysign Int'l, Inc. v. *City & County of Honolulu*, 276 F.3d 1109 (9th Cir. 2002) 12
United States v. *Causby*, 328 U.S. 256 (1946) 2
United States v. *Locke*, 529 U.S. 89 (2000) 9
Vorhees v. *Naper Aero Club, Inc.*, 272 F.3d 398 (7th Cir. 2001) 12
Wainwright v. *Goode*, 464 U.S. 78 (1983) 7, 8

Constitution, statutes and regulations:

U.S. Const. Amend. V (Just Compensation Clause) ... 8, 19
Air Commerce Act of 1926, Pub. L. No. 69-254, 44 Stat. 568:
§ 6, 44 Stat. 572 1
§ 10, 44 Stat. 574 ..... 1, 2

Statutes and regulations—Continued: Page

Federal Aviation Act of 1958, Pub. L. No. 85-726, § 101(24), 72 Stat. 739 2
Federal Airport Act Amendments of 1964, Pub. L. No. 88-280, § 10(1), 78 Stat. 161 10
49 U.S.C. 40102(a)(32) (Supp. V 2005) 2, 11, 13
49 U.S.C. 40103(a)(1) 2, 11, 12
49 U.S.C. 40103(a)(2) 2, 11, 13
49 U.S.C. 40116(b) 15
49 U.S.C. 47101(a)(8) 3
49 U.S.C. 47107(a)(9) 3
49 U.S.C. 47107(a)(10) 3, 18
49 U.S.C. 47110(c)(1) 3, 19
49 U.S.C. 44718 2
49 U.S.C. 44718(b) 3
14 C.F.R. 77.13 2
14 C.F.R. 77.35(c) 3
14 C.F.R. 91.119(b) 2
14 C.F.R. 91.119(c) 2

Miscellaneous:

FAA Advisory Circular:
No. 150/5190-4A, *A Model Zoning Ordinance to Limit Height of Objects Around Airports* (Dec. 14, 1987) <http://www.faa.gov/airports_airtraffic/airports/resources/advisory_circulars/media/150-5190-4A/150_5190_4A.pdf> 19, 20

Miscellaneous—Continued: Page

No. 150/5100-17, *Land Acquisition and Relocation Assistance for Airport Improvement Program (AIP) Assisted Projects* (Nov. 7, 2005) <http://www.faa.gov/airports_airtraffic/airports/resources/advisory_circulars/media/150-5100-17/150_5100_17_chg6.pdf> 21

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In the Supreme Court of the United States

No. 07-373

CLARK COUNTY, NEVADA, PETITIONER

v.

VACATION VILLAGE, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

1. a. In the Air Commerce Act of 1926 (ACA), ch. 344, § 6, 44 Stat. 572, Congress "declare[d] that the Government of the United States has, to the exclusion of all foreign nations, complete sovereignty of the airspace over the lands and waters of the United States, including the Canal Zone." The ACA further stated that "navigable airspace shall be subject to a public right of freedom of interstate and foreign air navigation." *Id.* § 10, 44 Stat. 574. Federal law currently provides that "[t]he United States Government has exclusive sovereignty of

airspace of the United States," 49 U.S.C. 40103(a)(1), and that citizens of the United States have "a public right of transit through the navigable airspace," 49 U.S.C. 40103(a)(2).

Congress originally defined the term "navigable airspace" as "airspace above the minimum safe altitudes of flight prescribed by the Secretary of Commerce." ACA § 10, 44 Stat. 574; see *United States* v. *Causby*, 328 U.S. 256, 263 (1946). In *Causby*, this Court held that "navigable airspace" as so defined did not extend downward to include the "path of glide"—*i.e.*, the path of an airplane to or from the ground during landing or takeoff. *Ibid.*; see *Griggs* v. *Allegheny County*, 369 U.S. 84, 88 (1962). Congress subsequently amended the definition of "navigable airspace" to include "airspace needed to insure safety in take-off and landing of aircraft." Federal Aviation Act of 1958, Pub. L. No. 85-726, § 101(24), 72 Stat. 739; see *Griggs*, 369 U.S. at 88; 49 U.S.C. 40102(a)(32) (Supp. V 2005) (current definition of "navigable airspace"). Federal regulations have long specified the "minimum safe altitudes" for flight as 1000 feet above the highest obstacle in congested areas and 500 feet above the surface in other areas. 14 C.F.R. 91.119(b) and (c). No federal regulation defines the scope of the "navigable airspace" that is "needed to ensure safety in the takeoff and landing of aircraft." 49 U.S.C. 40102(a)(32) (Supp. V 2005).

b. Persons who propose "construction, alteration, establishment, or expansion" of a structure more than 200 feet above ground level or within a specified proximity to an airport must notify the Federal Aviation Administration (FAA). See 49 U.S.C. 44718; 14 C.F.R. 77.13. Upon receipt of such notice, the FAA conducts an aeronautical study "to decide the extent of any adverse

impact on the safe and efficient use of the airspace." 49 U.S.C. 44718(b). The FAA then issues "a determination as to whether the proposed construction or alteration would be a hazard to air navigation." 14 C.F.R. 77.35(c). Those "hazard determinations" are advisory and have no legally enforceable effect. See *AOPA* v. *FAA*, 600 F.2d 965, 966 (D.C. Cir. 1979). The FAA does not have the legal authority to prohibit construction that it deems a hazard to air navigation. *Id.* at 967.

Rather, under the federal statutory scheme, airport operators (like the local governmental unit that is the petitioner in this case) are responsible for preventing hazards to airport operations. Federal law seeks "to ensure that nonaviation usage of the navigable airspace be accommodated but not allowed to decrease the safety and capacity of the airspace and airport system." 49 U.S.C. 47101(a)(8). Accordingly, recipients of federal airport development grants must provide written assurance that they will take "appropriate action" to ensure that airspace needed for airport operations "will be cleared and protected by mitigating existing, and preventing future, airport hazards." 49 U.S.C. 47107(a)(9). Grant recipients must also promise that "appropriate action, including the adoption of zoning laws, has been or will be taken to the extent reasonable to restrict the use of land next to or near the airport to uses that are compatible with normal airport operations." 49 U.S.C. 47107(a)(10). Grant recipients are authorized to use federal funds to acquire "property interests in land or airspace." 49 U.S.C. 47110(c)(1).

2. Since the 1940s, petitioner Clark County has operated what is now known as McCarran International Airport (McCarran) and has used its zoning laws to regulate use of the surrounding land and airspace. Pet.

App. 4a, 42a. In 1964, respondents purchased a parcel of land approximately 2600 feet from the end of one of the airport's runways. *Id.* at 4a, 36a. In 1981, petitioner enacted Ordinance 728, which limited the height of structures near the airport using a slope of twenty feet outward for every foot upward (which the parties refer to as a "'20:1' slope surface"). *Id.* at 5a. On respondents' parcel, Ordinance 728 limited buildings to between 74 and 104 feet above ground level. *Id.* at 42a. In 1988, petitioner granted respondents a permit "to construct and maintain a 501-room, two-story hotel, and an 85,000-square foot casino." *Id.* at 6a. Respondents' plans included a sign 80 feet high, a casino 47 feet high, five hotel buildings 28 feet high, and three hotel buildings 76 feet high. *Id.* at 39a.

Subsequently, however, petitioner proposed to change the runway nearest respondents' parcel to allow for precision instrument approach, which necessitated lowering the slope of the approach path from 20:1 to 50:1. Pet. App. 40a. In January 1990, the FAA determined that respondents' planned construction would constitute a hazard to air navigation in light of the lowered approach path. *Id.* at 6a. Respondents agreed to lower the height of their project to 38 feet, and the FAA determined in June 1990 that the project as described in the revised proposal "would not adversely affect the safe and efficient use of navigable airspace." *Ibid.*; see *id.* at 41a. In July 1990, petitioner enacted Ordinance 1221, which imposed height restrictions using a 50:1 slope in the instrument runway approach zone and had the effect of limiting structures on respondents' parcel to between five and 25 feet above ground level. *Id.* at 6a, 42a. Ordinance 1221 also provided, however, that structures up to 35 feet were allowed in any zone. *Id.* at 42a.

3. a. In December 1993, respondents filed suit against petitioner in Nevada state court. Pet. App. 7a. Respondents' complaint alleged, inter alia, that Ordinance 1221 effected an inverse condemnation of the airspace above their tract. *Ibid.* In 1997, respondents filed in federal court a petition for bankruptcy under Chapter 11, listing their inverse-condemnation claim against petitioner as a contingent and unliquidated claim of the estate. *Ibid.* Respondents subsequently removed their takings claims to the federal bankruptcy court. *Id.* at 8a.

Following a bench trial, the bankruptcy court entered judgment for respondents, awarding them $4,886,779 plus interest, costs, and fees for the taking of airspace "between the 20:1 approach and the lower 50:1 precision instrument approach path instituted after the airport expansion." Pet. App. 27a. The court based the award on its conclusion that respondents' parcel was worth $10.00 per square foot before the enactment of Ordinance 1221 and $5.50 afterwards, and by multiplying the $4.50 per-square-foot difference by the tract's total area (1,085,951 square feet). *Ibid.* The district court subsequently entered judgment for respondents in a total amount (including fees and interest) of $10,121,686. *Id.* at 9a.

b. While petitioner's appeal was pending in the Ninth Circuit, the Nevada Supreme Court issued its decision in *McCarran Int'l Airport* v. *Sisolak*, 137 P.3d 1110 (2006), cert. denied, 127 S. Ct. 1260 (2007). As in the instant case, the plaintiff in *Sisolak* contended that height restrictions imposed by petitioner under Ordinance 1221 and a related Ordinance 1599 to facilitate takeoffs and landings at McCarran effected a taking of property that required the payment of just compensa-

tion. The Nevada Supreme Court agreed, concluding that, "[b]ecause the height restriction ordinances authorize airplanes to make a permanent, physical invasion of the landowner's airspace, * * * a *Loretto*-type regulatory per se taking occurred, requiring an award of just compensation." *Id.* at 1114 (footnote omitted) (citing *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)).

The Nevada Supreme Court in *Sisolak* stated that, for purposes of federal constitutional analysis under *Griggs*, "although airplanes may fly below 500 feet when necessary for takeoff and landing, this right does not divest the property owner of his protected property right to his usable airspace. Rather, a landowner may still make a claim for compensation for the government's use of that airspace." 137 P.3d at 1119 (footnotes omitted). The court further concluded that under Nevada law, landowners "hold a property right in the usable airspace above their property up to 500 feet." *Id.* at 1120. The court held that the ordinances effected a taking under both the federal and state constitutions. See *id.* at 1120, 1124, 1126-1127. The state court accordingly affirmed a jury verdict under which just compensation had been computed by subtracting the value of the property after the height restrictions were imposed under Ordinances 1221 and 1599 from the value of the land prior to adoption of those ordinances. See *id.* at 1118, 1127-1128, 1130.

4. Relying on the Nevada Supreme Court's decision in *Sisolak*, the court of appeals in this case held that Ordinance 1221 had effected a taking of respondents' property under Nevada law. Pet. App. 1a-25a. The Ninth Circuit "respectfully disagree[d]" with the *Sisolak* court's "interpretation of federal takings jurispru-

dence," and it concluded that "[n]o Fifth Amendment taking of [respondents'] property occurred." *Id.* at 18a. The court held, however, that it was bound by the Nevada Supreme Court's interpretation of the state constitution. *Id.* at 18a-19a. Relying on *Jankovich* v. *Indiana Toll Road Comm'n*, 379 U.S. 487 (1965), the court rejected petitioner's contention that the state-law compensation requirement announced in *Sisolak* was preempted by federal statutes governing aviation. Pet. App. 19a-20a.

The court of appeals further held that the district court's calculation of just compensation was premised on an interpretation of certain avigation easements that was inconsistent with *Sisolak*'s treatment of comparable easements under state law. Pet. App. 22a. Accordingly, the court vacated the judgment and remanded for reconsideration of the just-compensation award in light of *Sisolak*. *Id.* at 25a. The court explained that, under *Sisolak*, "just compensation is measured by the fair market value of the condemned property," which in turn is "determined by reference to the highest and best use for which the land is available," so long as "the highest and best use [is] 'reasonably probable,'" considering zoning ordinances that would be taken into account by a prudent and willing buyer. *Id.* at 22a-23a (quoting *Sisolak*, 137 P.3d at 1128).

DISCUSSION

A. States Are Generally Free To Accord Protections Under Their State Constitutions That Are More Extensive Than The Federal Constitution Requires

As a general matter, "the views of the State's highest court with respect to state law are binding on the federal courts," including on this Court. *Wainwright* v. *Goode*,

464 U.S. 78, 84 (1983) (per curiam). A narrow exception to that rule applies if the state court's interpretation of state law reflects the perception that federal law compels that reading. See, *e.g.*, *Michigan* v. *Long*, 463 U.S. 1032, 1038 n.4 (1983) (per curiam); *Delaware* v. *Prouse*, 440 U.S. 648, 652-653 (1979); Pet. App. 18a. In this case, however, the court of appeals found that the Nevada Supreme Court's state-law ruling in *Sisolak* provided an independent ground of decision and was not based on the perceived compulsory force of federal takings precedents. See *id.* at 18a-19a. Petitioner does not challenge that aspect of the Ninth Circuit's decision.

A State ordinarily "may grant its citizens broader protection than the Federal Constitution requires by enacting appropriate legislation or by judicial interpretation of its own Constitution." *Danforth* v. *Minnesota*, 128 S. Ct. 1029, 1046 (2008); see, *e.g.*, *Cooper* v. *California*, 386 U.S. 58, 62 (1967). The takings context is no exception. Indeed, this Court has recognized that a State may impose limits on takings of private property by local governments that are stricter than the limits established by the Fifth Amendment. See *Kelo* v. *New London*, 545 U.S. 469, 489 & nn.22-23 (2005). Consistent with those decisions, petitioner recognizes (Pet. 18) that "States may generally afford greater constitutional protection to property rights than the federal constitution does."

Petitioner contends, however, that this general rule is inapplicable to local ordinances that are designed to prevent obstructions to "navigable airspace" as defined in federal law. In petitioner's view, federal aviation statutes broadly preempt state authorities from requiring compensation in this setting except where compensation is required by the Fifth Amendment. See, *e.g.*, Pet. 14,

17, 18, 26. While Congress presumably could enact statutes expressly adopting this relatively complicated rule for preemption of state takings law, petitioner does not contend that Congress has done so. Rather, petitioner relies on principles of implied conflict preemption, under which federal law preempts state law where compliance with both federal and state law is impossible or where state law poses an obstacle to accomplishing the full purposes and objectives of Congress as expressed in a statute. See, *e.g.*, *United States* v. *Locke*, 529 U.S. 89, 109 (2000); *Geier* v. *American Honda Motor Co.*, 529 U.S. 861, 873 (2000). For the reasons that follow, petitioner's arguments lack merit.

B. Petitioner's Broad Preemption Theory Cannot Be Reconciled With This Court's Decision In *Jankovich*

1. In *Jankovich*, this Court considered a landowner's challenge to a municipal ordinance that, by restricting the height of structures on land near an airport, precluded the operation of the plaintiff's raised toll road. See 379 U.S. at 488. The Indiana Supreme Court held that the ordinance was invalid because it "purported to authorize an unlawful and unconstitutional appropriation of property rights without payment of compensation." *Id.* at 489 (quoting *Indiana Toll Rd. Comm'n* v. *Jankovich*, 237 N.E.2d 237, 242 (Ind. 1963)). That holding was based in part on the state court's holding that Indiana landowners "have a protected property interest in the airspace above their land." *Id.* at 490; see *id.* at 490-491.

This Court dismissed the writ of certiorari as improvidently granted, holding that the Indiana Supreme Court's ruling rested on an independent and adequate state ground because it was based in part on the Indiana

constitution. *Jankovich*, 379 U.S. at 489-492. The Court rejected the municipality's contention "that the state ground of decision is not *adequate* because it is inconsistent with the policy of the Federal Airport Act." *Id.* at 492. The Court recognized that a then-recent amendment to the Airport Act required airport authorities to take "appropriate action, *including the adoption of zoning laws*," to restrict uses of adjacent land that would impede aircraft takeoffs and landings. *Id.* at 494 (quoting the Federal Airport Act Amendments of 1964, Pub. L. No. 88-280, § 10(1), 78 Stat. 161). It observed, however, that the FAA, in implementing that requirement, had allowed airport operators to prevent such hazards *either* by acquiring easements or other interests in adjacent land, *or* by adopting zoning ordinances. *Ibid.* The Court "conclude[d] that the decision of the Supreme Court of Indiana in this case is compatible with the congressional policy embodied in the Federal Airport Act." *Id.* at 494-495.[1]

---

[1] As the Court in *Jankovich* explained, its preemption analysis was consistent with the position of the United States in that case. See 379 U.S. at 494. The United States' amicus memorandum, while disagreeing with the Indiana Supreme Court's analysis of federal constitutional law, explained (at 2 n.1):

> [W]e note our disagreement with petitioner's argument that the State ground of decision was not *adequate* because a State law forbidding airport height-limitation zoning would in any event violate the Supremacy Clause (Pet. Br. 53-56). It may be true, as petitioners argue, that the Federal Airport Act assumes that "local power to zone exists," but the form of assurance completed by the grantee in this respect carefully requires only that it act "[i]nsofar as it is within its power" (Pet. Br. 28). There is no basis for a contention that federal law removes State law restrictions on the exercise of the zoning power or defeats any State law right to compensation.

As the court of appeals recognized (Pet. App. 19a-20a), petitioner's broad theory of preemption cannot be reconciled with this Court's decision in *Jankovich*. If (as petitioner contends) a State's power in this area were limited to height restrictions that effected a federal taking, this Court could not have concluded that the state court's takings analysis was "compatible with the congressional policy embodied in the Federal Airport Act," *Jankovich*, 379 U.S. at 495, while simultaneously "express[ing] no opinion * * * regarding the validity under the United States Constitution of the city's airport zoning ordinance," *id.* at 495 n.3. The decision in *Jankovich* clearly reflects a determination by this Court that States have at least some authority to require compensation for airport-area height restrictions that would not necessarily effect a taking under federal law.

2. Petitioner observes (Pet. 25) that the Court in *Jankovich* did not address the possible preemptive effect of the federal statutory provisions on which petitioner principally relies—*viz.*, 49 U.S.C. 40102(a)(32) (Supp. V 2005), which defines the "navigable airspace" to include "airspace needed to ensure safety in the takeoff and landing of aircraft"; 49 U.S.C. 40103(a)(1), which states that "[t]he United States Government has exclusive sovereignty of airspace of the United States"; and 49 U.S.C. 40103(a)(2), which states that a "citizen of the United States has a public right of transit through the navigable airspace." At the time *Jankovich* was decided, however, those statutory provisions existed in essentially their current form. And while the municipality's preemption argument in *Jankovich* focused on the Airport Act, see 379 U.S. at 493, this Court stated more broadly that "no substantial claim can be made that Congress intended to preclude such an application of

state law as is involved in the present case," *id.* at 494. That more generic formulation was consistent with the memorandum filed by the United States, which stated (see note 1, *supra*) that "[t]here is no basis for a contention that federal law removes State law restrictions on the exercise of the zoning power or defeats any State law right to compensation." This Court should not lightly conclude that the petitioners, the United States, and the Court in *Jankovich* all overlooked a dispositively preemptive federal statute in addressing a preemption question that was not substantively different from the one presented here. That is particularly so because the statutory provisions that the Court considered in *Jankovich*, unlike the provisions on which petitioner relies, directly address the process by which airport operators acquire property needed for airport construction or expansion or regulate that property to facilitate takeoffs and landings.

In any event, the state-law right of compensation recognized in *Sisolak* and applied in this case does not conflict with the statutory provisions on which petitioner relies. In *Braniff Airways, Inc.* v. *Nebraska State Board of Equalization & Assessment*, 347 U.S. 590 (1954), the Court held that the statutory predecessor to current 49 U.S.C. 40103(a)(1) "was an assertion of exclusive national sovereignty" but "did not expressly exclude the sovereign powers of the states." *Id.* at 595. Rather than defining the boundary between state and federal power, Section 40103(a)(1) declares the sovereignty of the United States, to the exclusion of other *nations*, over the "airspace of the United States." See *Skysign Int'l, Inc.* v. *City & County of Honolulu*, 276 F.3d 1109, 1116 (9th Cir. 2002); *Vorhees* v. *Naper Aero Club, Inc.*, 272 F.3d 398, 404 (7th Cir. 2001).

Nor does the compensation remedy at issue in this case conflict with the statutory right of United States citizens (see 49 U.S.C. 40103(a)(2)) to travel through the navigable airspace. The determination whether particular airspace is "needed to ensure safety in the takeoff and landing of aircraft," 49 U.S.C. 40102(a)(32) (Supp. V 2005), and is therefore part of "navigable airspace" as defined by federal law, necessarily depends on the location of airports and the manner of their operations. The expansion of an existing airport, or the modification of its operations (like the shift from a 20:1 to a 50:1 approach path in this case), will often cause the statutory definition to encompass airspace that was not previously covered. The compensation requirement announced in *Sisolak* pertains to the process by which particular airspace *becomes* part of the "navigable airspace" as a result of changes in airport operations. State-mandated compensation for property taken during that process does not, in and of itself, conflict with the public right of transit through the "navigable airspace" once those changes have been accomplished.

C. Although State-Law Restrictions On Airport Zoning Might Under Some Circumstances Raise Significant Preemption Concerns, This Case Is Not A Suitable Vehicle For Determining The Applicable Limits On State Authority

The Court in *Jankovich* observed that the state court's opinion in that case did "not portend the wholesale invalidation of all airport zoning laws." 379 U.S. at 493. The Court concluded that "no substantial claim can be made that Congress intended to preclude *such an application of state law as is involved in the present case*." *Id.* at 494 (emphasis added). *Jankovich* thus

leaves open the possibility that some state-law restrictions on airport zoning might be so extreme, disruptive, or discriminatory as to create a conflict with federal law. In two respects, the Nevada Supreme Court's decision in *Sisolak* is unclear, but may raise concerns that could (depending on how that court clarifies the applicable state-law standard in subsequent cases) ultimately create substantial preemption questions.

First, the Nevada Supreme Court in *Sisolak* endorsed the trial court's finding that "the presence of aircraft over Sisolak's property at altitudes below 500 feet, as permitted by [petitioner's height-restriction] Ordinances, constituted a permanent physical invasion of his property and was sufficient to establish a taking." 137 P.3d at 1125. That language suggests that the Nevada Supreme Court might find a taking whenever a privately owned tract is subject to recurring overflights at altitudes lower than 500 feet, even in the absence of any diminution of the owner's use and enjoyment of the subjacent land or its value. On the other hand, the court in *Sisolak* repeatedly stressed—including in the passage just quoted—that its finding of a taking depended on the existence of ordinances that both imposed height restrictions and (as the court saw it) affirmatively authorized a physical invasion of the airspace above the height limits as a matter of state law. *Id.* at 1114, 1130. It therefore is unclear whether mere overflights, unaccompanied by such an ordinance, would trigger per se taking analysis under the decision in *Sisolak*. Moreover, whether or not the existence of such an ordinance is a prerequisite to application of *Sisolak*'s rationale, it is unclear what (if any) compensation the Nevada Supreme Court would order in the hypothetical circumstance just posited. But if the state court awarded significant mon-

etary relief based on the fact of overflights alone, without evidence that the overflights had materially reduced the value of the subjacent property, its decision might be viewed as the functional equivalent of a state-law penalty or tax on the operation of the airport. Such a state-law holding would raise significant preemption concerns. Cf. 49 U.S.C. 40116(b) (providing that a State or political subdivision "may not levy or collect a tax, fee, head charge, or other charge" on the transportation of individuals in air commerce).

Second, while holding that Ordinance 1221 effected a per se taking, the Nevada Supreme Court in *Sisolak* observed that, "[l]ike most property rights, the use of the airspace and subadjacent land may be the subject of valid zoning and related regulations which do not give rise to a takings claim." 137 P.3d at 1120 n.25. This passage suggests that the court might not have found a taking if the height limitation had been significantly higher, but less than 500 feet, perhaps on the theory that the airspace above that higher limitation was not "useable" as a practical matter. See *id.* at 1121 (stating that the plaintiff landowner "has a property interest in the useable airspace above his property up to 500 feet"); see also *id.* at 1119. The court also may have left open the possibility that petitioner could have imposed height restrictions upon the plaintiff landowner equivalent to those under Ordinance 1221, without incurring an obligation to pay compensation, if the restrictions were intended to serve purposes other than airport safety. To the extent that comparable height restrictions placed on a near-airport landowner are accompanied by actual overflights that result in a reduction of the property's value beyond that caused by the height restrictions alone, those overflights might provide a valid basis for

distinguishing the affected landowner from a plaintiff whose tract is subject to equivalent height restrictions under a zoning law serving different purposes. But if the Nevada courts were to treat Ordinance 1221 as a per se taking without regard to the occurrence or economic effect of actual overflights above particular tracts, the *Sisolak* rule might be viewed as a form of discrimination against zoning designed to accommodate airport expansion under the federal program, thereby raising significant preemption concerns.

Jankovich therefore need not and should not be read to hold that federal law places *no* constraints on a State's ability to require compensation for airport-related zoning. This case, however, provides an unsuitable vehicle for clarifying the possible limits on state authority. As just explained, it is unclear whether Nevada courts would actually order a monetary payment in the absence of a measure such as Ordinance 1221, or to a plaintiff whose land was subject to Ordinance 1221 but who failed to establish that the airspace through which there were overflights was useable or that any actual overflights had an adverse impact on the property's value. Although the court in *Sisolak* held that proof of recurring overflights at altitudes below 500 feet was sufficient to establish a taking, 137 P.3d at 1125; see *id.* at 1116-1117 (noting that the plaintiff landowner in that case introduced evidence that "approximately 100 planes per day used his airspace at altitudes below 500 feet"), the court also emphasized that just compensation is measured by reference to the value of the taken property, see *id.* at 1128. The Nevada Supreme Court might therefore conclude that, where recurring overflights do not affect the value of the subjacent land, the just compensation owed is zero. See *Brown* v. *Legal Found.*, 538

U.S. 216, 235-236, 240 (2003) (explaining that, because "the 'just compensation' required by the Fifth Amendment is measured by the property owner's loss rather than the government's gain," no compensation is owed for a per se taking that causes no pecuniary harm to the property owner).

In any event, this case does not present the question whether compensation for overflights could appropriately be ordered absent proof of actual economic harm. The district court found that respondents had "shown that the increased frequency of flights of large general aviation aircraft over [their] property * * * directly, substantially, and immediately interfered with the enjoyment and use of [their] property," Pet. App. 54a, and the court calculated the amount of just compensation owed by determining the extent to which Ordinance 1221 had reduced the value of the subjacent land, see *id.* at 27a, 32a. Although the court of appeals remanded the case for recalculation of damages, the Ninth Circuit likewise emphasized that "just compensation is measured by the fair market value of the condemned property," which is "determined by reference to the highest and best use for which the land is available" so long as that use is "reasonably probable." *Id.* at 22a-23a (quoting *Sisolak*, 137 P.3d at 1128). Petitioner is therefore wrong in seeking to distinguish *Jankovich* on the ground that "the *Jankovich* property owner asserted a traditional takings claim—*i.e.*, that a zoning restriction deprived it of the use of its land"—whereas respondents "were compensated for loss of a state law right to exclusive ownership of all navigable airspace up to 500 feet above their land." Pet. 24, 25. Because the compensation award in this case was premised on evidence of a substantial diminution in the value of petitioner's tract, and because the

amount of the award is to be calculated by reference to that diminution, the rationale for takings liability here is not fundamentally different from the landowner's theory in *Jankovich*.

Finally, although petitioner asserts that the compensation requirement announced in *Sisolak* will have particularly disruptive effects on the national aviation system, petitioner's legal theory does not turn on the *extent* of the economic impact that the challenged state-law rule can be expected to entail. Rather, petitioner argues that States have *no* authority to require compensation for height restrictions or associated overflights that do not effect a federal-law taking. The Court in *Jankovich* unequivocally rejected that proposition, and there is no need for the Court to revisit that holding now.

D. Petitioner Has Failed To Demonstrate That The State-Law Compensation Requirement Applied In This Case Will Disrupt The Federal Aviation Regime

Petitioner contends that the state-law rule applied by the Ninth Circuit in this case will disrupt the national aviation system by (1) creating financial disincentives to airport expansion and improvement (Pet. 19-22) and (2) granting subjacent landowners a right to "exclude" others from the navigable airspace (Pet. 18, 26, 29). Those arguments provide no basis for finding preemption in this case.

1. The federal statutory scheme does not suggest that States are categorically preempted from imposing financial prerequisites to airport construction or expansion that go beyond those contained in the federal Constitution. See *Jankovich*, 379 U.S. at 494. Under the federal regime, airport operators may use both "zoning" (49 U.S.C. 47107(a)(10)) and the acquisition of "property

interests in land or airspace" (49 U.S.C. 47110(c)(1)) to ensure that nearby property is not used in a manner that impedes airport operations. In administering federal airport funding programs, the FAA encourages airport operators to reduce costs by relying to the maximum permissible extent on uncompensated zoning, rather than on the acquisition of fee or easement interests, to prevent hazards to airport operations. See, *e.g.*, *FAA, U.S. Dep't Transp., Order 5100.38C, Airport Improvement Program Handbook* para. 701(b)(2), at 122 (June 28, 2005) <http://www.faa.gov/airports_airtraffic/airports/resources/publications/orders/media/aip_5100_38c.pdf> (explaining that, in approach and transitional zones outside the Runway Protection Zone, "[u]nless there is a need for the land for future development or noise compatibility purposes, sponsors should be encouraged to acquire the minimum property interest necessary to assure safe aeronautical use"). The FAA has issued a model zoning ordinance for possible enactment by local airport operators, which states that the prevention of obstructions to air traffic "should be accomplished, to the extent legally possible, by the exercise of the police power without compensation." *FAA Advisory Circular No. 150/5190-4A, A Model Zoning Ordinance to Limit Height of Objects Around Airports* App. 3, at 1 (Dec. 14, 1987) <http://www.faa.gov/airports_airtraffic/airports/resources/advisory_circulars/media/150-5190-4A/150_5190_4A.pdf> (*FAA Advisory Circular No. 150/5190-4A*).

The FAA has recognized, however, that a local airport operator's ability to use zoning for these purposes may be constrained by state and local law as well as by the Just Compensation Clause of the federal Constitution. Some local governmental bodies that operate air-

ports, for example, lack the legal authority to engage in zoning or otherwise to restrict the uses of nearby off-airport property. Although the FAA encourages airport operators to make the maximum permissible use of whatever zoning authority they possess, and to adopt the model zoning ordinance (or some variant thereof) if it is within their power to do so, the agency has not taken the view that such state- or local-law limitations on an airport operator's zoning power are preempted by federal aviation statutes. To the contrary, the FAA's guidance appears to contemplate a diversity of state and local zoning and property-rights regimes. And the model zoning ordinance issued by the FAA cautions that "[a]ny height limitations imposed by a zoning ordinance * * * should not be so low at any point as to constitute a taking of property * * * *under local law*." *FAA Advisory Circular No. 150/5190-4A* para. 5.d at 3 (emphasis added).

To be sure, the existence of a state-law regime requiring compensation for what federal law would deem a permissible and non-compensable regulation may sometimes cause airports to be located in relatively inconvenient venues, away from otherwise valuable property. Much of the inconvenience of that state determination, however, will be visited locally. And, while there may be preemption in certain cases, see pp. 13-16, *supra*, the federal statutory and regulatory scheme appears to contemplate variations among local property-rights regimes.

In addition, FAA guidance to airport operators specifically contemplates that state laws governing the acquisition of land may sometimes require payments that exceed federal requirements:

> State law may require a Sponsor to include with its market value appraisal, additional compensation for items required under state law. It is FAA policy that these costs exceed entitlements prescribed in Title 49 CFR, Part 24. Items generally held to be non-compensable in eminent domain include loss of business, payment for goodwill, frustration of development plans, and other limitations described in the *Uniform Appraisal Standards for Federal Land Acquisitions* as ineligible for Federal reimbursement. The Sponsor's review appraisal report must identify such items separate from the appraised market value for the acquired real property.

FAA Advisory Circular No. 150/5100-17, Land Acquisition and Relocation Assistance for Airport Improvement Program (AIP) Assisted Projects Ch. 2-6, at 15 (Nov. 7, 2005) <http://www.faa.gov/airports_airtraffic/airports/resources/advisory_circulars/media/150-5100-17/150_5100_17_chg6.pdf> (*Advisory Circular*). That *Advisory Circular* thus recognizes that state law governing land acquisition for airport or other public purposes sometimes requires payment for items that, under federal standards, would be "non-compensable in eminent domain." *Ibid.* Rather than suggesting that such state-law requirements are preempted, however, the *Advisory Circular* simply warns that the additional expenditures are "ineligible for Federal reimbursement." *Ibid.* Although the *Advisory Circular* does not specifically address the acquisition of airspace or the imposition of height restrictions to prevent obstacles to the safe takeoff and landing of aircraft, the guidance it provides is inconsistent with any categorical argument that the federal regime preempts all state-law compensation

requirements that increase the cost of airport expansion above the federal constitutional minimum.

2. Petitioner errs in describing the decision in *Sisolak* as recognizing a right of subjacent landowners "to exclude the public from navigable airspace." Pet. 18; see Pet. 26, 29. In neither *Sisolak* nor this case did the plaintiffs seek an injunction that would *prevent* overflights through the airspace above their tracts. Rather, the plaintiffs in both cases sought *compensation* for height restrictions and associated authorization of overflights, based on evidence of diminution of the value of their lands. The Nevada Supreme Court evidently saw no contradiction between the provision of a monetary remedy and the proposition (which the state court unequivocally accepted) that airplanes traveling over the plaintiff's property "may fly below 500 feet when necessary for takeoff and landing." *Sisolak*, 137 P.3d at 1119. The state court's recognition that a landowner has a property interest in usable airspace up to 500 feet, moreover, does not distinguish this case from *Jankovich*, where the Indiana Supreme Court likewise held that the plaintiff landowners "did have a protected property interest in the airspace above their land." 379 U.S. at 490.

For purposes of the preemption question presented here, the relevant question is whether the state-law *compensation* requirement actually enforced in this case disrupts the federal aviation regime, not whether recognition of a landowner's property interest in the superjacent airspace could as a theoretical matter imply a right to exclude. That pragmatic approach is especially appropriate because the basis for federal jurisdiction in this case was the bankruptcy power. The function of the courts below therefore was to supervise the division of

the bankruptcy estate—not to pass on any question concerning the potential further implications of the state-law right recognized in *Sisolak*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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In The

Supreme Court of the United States

CLARK COUNTY, NEVADA,

Petitioner,

v.

VACATION VILLAGE, INC., *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF ON BEHALF OF THE AIR LINE PILOTS ASSOCIATION, INTERNATIONAL; THE AIR TRANSPORT ASSOCIATION OF AMERICA, INC.; THE AIRCRAFT OWNERS AND PILOTS ASSOCIATION; AIRPORTS COUNCIL INTERNATIONAL-NORTH AMERICA; AND THE REGIONAL AIRLINE ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 5

REVIEW IS WARRANTED HERE BECAUSE THE CONTINUED SAFE OPERATION OF OUR NATIONAL AVIATION SYSTEM REQUIRES PREEMPTION OF STATE LAW TAKINGS CLAIMS, LIKE RESPONDENTS', THAT FRUSTRATE THE COOPERATIVE EFFORT OF FEDERAL AND LOCAL GOVERNMENTS TO PREVENT HAZARDOUS OBSTRUCTIONS NEAR AIRPORTS 5

A. This Case Is Indicative Of A Gathering Storm That Threatens The Future Of Our National Aviation System, And It Presents This Court With An Ideal Opportunity To Avoid That Result 6

1. This second multimillion-dollar judgment against petitioner will undoubtedly lead to many other such lawsuits 6

2. The instant case is an ideal vehicle for this Court's resolution of the preemption issue 8

3. The Ninth Circuit's misreading of this Court's opinion in *Jankovich* to establish a categorical non-preemption rule requires this Court's intervention 9

TABLE OF CONTENTS—Continued

Page

B. Federal Law Preempts State Law Claims That Interfere With The Cooperative Regulatory System That Congress Has Authorized And The FAA Enforces In Conjunction With Local Governments 11

1. Our complex National Aviation System functions safely and efficiently because it is based on cooperative federalism 11

2. Nevada's *per se* airspace takings rule is preempted because it interferes with the statutory right of public transit through navigable airspace and the regulatory safety objectives necessary to ensure that right 15

3. If the ruling below is not reviewed, there will be dramatic, adverse effects on the safe and efficient use of the nation's navigable airspace 17

a. Development that poses safety concerns will also affect airport operations and capacity 17

b. Future airport expansion and investment will be limited 18

c. The balance of power between landowners and government entities during hazard negotiations will shift 18

d. Smaller airports and rural communities will be especially vulnerable 19

e. There will be a ripple effect on nationwide air carrier services 19

CONCLUSION 20

TABLE OF AUTHORITIES

Page

CASES:

Adams v. County of Dade, 335 So. 2d 594 (Fla. Dist. Ct. App. 1976) 18

Board of County Commissioners v. Lowery, 136 P.3d 639 (Okla. 2006) 7

Boyle v. United Technologies Corp., 487 U.S. 500 (1988) 16

City of Burbank v. Lockheed Air Terminal Inc., 411 U.S. 624 (1973) 11

City of Norwood v. Horney, 853 N.E.2d 1115 (Ohio 2006) 7

Freightliner Corp. v. Myrick, 514 U.S. 280 (1995) 15

Griggs v. County of Allegheny, Pennsylvania, 369 U.S. 84 (1962) 8, 9

Indiana Toll Road Commission v. Jankovich, 193 N.E.2d 237 (Ind. 1963), *cert. granted*, 377 U.S. 942 (1964), *cert. dismissed*, 379 U.S. 487 (1965) 9

Jankovich v. Indiana Toll Road Commission, 379 U.S. 487 (1965) 3, 8, 9, 10

Lingle v. Chevron U.S.A. Inc., 544 U.S. 528 (2005) 8

Manufactured Housing Communities of Washington v. State, 13 P.3d 183 (Wash. 2000) 7

McCarran International Airport v. Sisolak, 137 P.3d 1110 (Nev. 2006), *cert. denied*, 127 S. Ct. 1260 (2007) 5, 6, 7

Northwest Airlines, Inc. v. Minnesota, 322 U.S. 292 (1944) 11, 12

TABLE OF AUTHORITIES—Continued

Page

Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978) 6, 8, 10

Sprietsma v. Mercury Marine, 537 U.S. 51 (2002) 15

United States v. Causby, 328 U.S. 256 (1946) 8, 9

Williamson County Regional Planning Commission v. Hamilton Bank, 473 U.S. 172 (1985) 9

STATUTES AND REGULATIONS:

49 U.S.C.:
§ 40101(a)(14) 12
§ 40102(a)(32) 13, 16
§ 40103(a)(1) 3, 12
§ 40103(a)(2) 3, 12, 16
§ 40103(a)(3) 12
§ 40103(b)(1) 13, 16
§ 47101(a)(1) 12
§ 47101(a)(7) 12
§ 47101(a)(8) 16
§ 47107(a)(10) 4, 13, 16

14 C.F.R. Pt. 77 14
§ 77.13 14
§ 77.25 14
§ 77.31 14
§ 77.33 14
§ 77.35 14

14 C.F.R. § 91.119 13

TABLE OF AUTHORITIES—Continued

Page

LOCAL CODES:

Adams County, Colo. Development Standards & Regulations § 3-29-05-02-09 (2007) 7

Broward County, Fla. Code § 39-359.2 (2007) 7

Carson City, Nev. Code § 16.02.030 (2007) 7

Jacksonville, Fla. Code § 656.10051 (1999) 7

Loudoun County, Va. Zoning Ordinance § 4-1404(B)(3) (1998) 7

Loudoun County, Va. Zoning Ordinance § 4-1404(D) (1998) 7

Miami-Dade County, Fla. Code § 33-335 (2007) 7

Phoenix, Ariz. Code § 4-240 (2007) 7

San Diego, Cal. Code §§ 132.0201-132.0209 (2006) 7

Washoe County, Nev. Development Code § 110.402.10(e) (1998) 6

MISCELLANEOUS:

Federal Aviation Administration, Advisory Circular 150/5190-4A, *A Model Zoning Ordinance to Limit Height of Objects Around Airports* (Dec. 14, 1987) 14

Federal Aviation Administration, Advisory Circular AC 70/7460-2K, *Proposed Construction or Alteration of Objects that May Affect the Navigable Airspace* (March 1, 2000) 14

Federal Aviation Administration, *FAA Aerospace Forecasts: Fiscal Years 2007-2020* (2007) 12

Federal Aviation Administration Order 7400.2E, Procedures for Handling Airspace Matters 14

TABLE OF AUTHORITIES—Continued

Page

Lynda J. Oswald, *Property Rights Legislation and the Police Power,* 37 AM. BUS. L.J. 527 (2000) 19

Richard N. Velotta, *Airport Land Use: Lawsuits Could Prompt Cuts At Las Vegas Airport,* THE LAS VEGAS SUN, May 28, 2003 ..... 7, 18

INTEREST OF *AMICI CURIAE*[1]

Amici curiae consist of five associations, each of which represents a different, critical component of the nation's air transportation industry: commercial airline pilots, passenger and cargo air carriers, private aircraft owners and pilots, local governments that own and operate nearly all the nation's commercial airports, and regional airlines.

These constituencies are well known to have conflicting views on many issues that affect the air transportation industry, but they are in unusual and complete agreement on the importance of the legal issue presented by this case. The Ninth Circuit's errant legal analysis threatens the public's right to safe and secure transit through our nation's navigable airspace. If left unreviewed, the ruling below will have a significant adverse impact on the *amici* and their members, whose daily operations are central to the nation's economy and to the travel needs of tens of millions of Americans.

The Air Line Pilots Association, International (ALPA) is a labor union that represents 61,000 professional airline pilots at 40 air carriers in the United States and Canada. ALPA's members operate at all air carrier airports in the United States, including McCarran International Airport in Las Vegas, which is at issue in this case. ALPA's motto is "schedule with safety," and ALPA is recognized in the airline industry for its contributions to flight safety.

The Air Transport Association of America, Inc. (ATA) is the principal trade and service organization of the major scheduled air carriers in the United States. ATA's members annually serve approximately 600 million passengers and transport millions of tons of air cargo in the National

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[1] Letters from all parties consenting to the filing of this brief are being filed with the Clerk of this Court along with this brief, pursuant to Supreme Court Rule 37.3(a). No counsel for a party authored this brief in whole or in part and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel, made any such monetary contribution.

Aviation System, including most of the visitors and cargo entering McCarran International Airport.

The Aircraft Owners and Pilots Association (AOPA) is a nationwide membership association of more than 400,000 individual pilots and aircraft owners. AOPA members fly and own most of the civil aircraft fleet of the United States, ranging from light sport aircraft to large turbojet aircraft. This segment of aviation is commonly known as "general aviation." In terms of hours flown, general aviation accounts for more than half of civil flying in the National Aviation System. General aviation utilizes McCarran International Airport and all other civilian airports in the country.

Airports Council International-North America (ACI-NA) is a trade association representing the state, regional, and local government bodies that own and operate the principal airports served by scheduled air carriers in the United States and Canada, including petitioner Clark County, Nevada, which owns and operates McCarran International Airport. The 135 ACI-NA member airports in the United States handle approximately 95 percent of the air passenger traffic in the United States.

The Regional Airline Association (RAA) represents short-haul scheduled airlines that provide service primarily between small and medium-sized communities and the nation's hub airports. RAA's 43 member airlines serve 99 percent of the airports in the United States with scheduled commercial service, including McCarran International Airport, and transport 97 percent of the passengers carried by regional airlines.

SUMMARY OF ARGUMENT

Local zoning ordinances that regulate land near airports are part of a federal system that guarantees the right of safe and efficient public air transit. Yet, according to the Ninth Circuit, the comprehensive, cooperative safety scheme enacted by Congress and implemented by the Federal Aviation Administration (FAA) does not prevent a State from imposing massive *per se* takings liability on local governments that enact height-restriction

zoning ordinances as part of this scheme, even when such restrictions do not constitute a taking under federal law.

The Ninth Circuit erred because state law that imposes such liability is preempted by federal aviation statutes and regulations. State standards for the taking of navigable airspace that expand the universe of compensable claims beyond that recognized under federal law frustrate, and effectively nullify, the carefully crafted scheme of cooperative federalism that ensures the capacity, safety, and development of our National Aviation System. Absent a decision from this Court confining the limits of state awards for the taking of navigable airspace, individual States can trump the federal interest in ensuring safe and efficient public transit through that airspace.

A. This is the second multimillion-dollar state takings judgment upheld against petitioner based on the Nevada Supreme Court's determination that any local regulation of the first 500 feet of airspace above privately-owned land is a *per se* taking under state law. These massive monetary judgments will surely spawn a flood of additional suits against local authorities in Nevada and elsewhere.

This case provides an ideal vehicle for the Court's determination of the preemption question because the Ninth Circuit assessed the takings claim under both federal and state law and found a compensable taking under the latter but not the former. Nevada's unqualified *per se* takings standard (upon which the Ninth Circuit's decision was based) substantially diverges from federal law in a manner that clearly highlights the Supremacy Clause problem. Moreover, the Ninth Circuit's categorical preemption analysis relies on a mistaken reading of this Court's decision in *Jankovich v. Indiana Toll Road Commission*, 379 U.S. 487 (1965).

B. Congress has expressly determined that the federal government has exclusive sovereignty over the nation's navigable airspace, 49 U.S.C. § 40103(a)(1), and that the public has a right to safe and efficient transit through that airspace, *id.* § 40103(a)(2). It has also recognized that cooperation between itself, the FAA, and

local zoning authorities is essential to the operation of our complex modern aviation system because local governments typically own and operate public-use airports. Congress specifically envisions and encourages the enactment of local zoning ordinances to eliminate aircraft safety hazards. *See id.* § 47107(a)(10).

Nevada's *per se* airspace takings law targets such local zoning ordinances and thereby frustrates congressional purposes. The local height restrictions at issue here, which are an essential part of the federal airspace management scheme, do not require payment of compensation to subjacent landowners under the federal Constitution. In reaching a distinctly different conclusion under its own law, Nevada burdens local governments that are acting in accordance with the objectives of Congress, thereby undercutting the cooperative system set forth in federal statutes and regulations. This frustration of federal purposes is particularly acute because Nevada's law makes compensation a *per se* entitlement whenever height-restriction zoning ordinances limit use of the first 500 feet of airspace in order to facilitate the safe takeoff and landing of aircraft.

Automatic, multimillion-dollar state law takings judgments threaten the National Aviation System in myriad ways. Every segment of the aviation industry (large and small, public and private) would experience crippling uncertainty as a result of a local government's potential liability. Such liability puts local governments in the untenable position of choosing between allowing hazardous construction or paying millions of dollars to individual landholders, each to the detriment of the flying public. The decreased investment that results from potential liability of this magnitude affects airport infrastructure, airline routes, and safety enhancements, even in areas of the country not directly affected by a State's takings law. Ultimately, as the system addresses the costs and risks of windfall awards that bear no relationship to landowners' reasonable investment-backed expectations, our Nation could experience an erosion of the

policies that have provided us with the safest and most efficient air transportation system in the world.

ARGUMENT

REVIEW IS WARRANTED HERE BECAUSE THE CONTINUED SAFE OPERATION OF OUR NATIONAL AVIATION SYSTEM REQUIRES PREEMPTION OF STATE LAW TAKINGS CLAIMS, LIKE RESPONDENTS', THAT FRUSTRATE THE COOPERATIVE EFFORT OF FEDERAL AND LOCAL GOVERNMENTS TO PREVENT HAZARDOUS OBSTRUCTIONS NEAR AIRPORTS

In July 2006, the Supreme Court of Nevada ruled that a local height-restriction zoning ordinance of petitioner Clark County, Nevada, that was designed to facilitate the safe takeoff and landing of aircraft at McCarran International Airport, constituted a *per se* regulatory taking as a matter of state constitutional law because the ordinance placed some limits on the use of certain airspace below 500 feet above ground level (AGL). *McCarran Int'l Airport v. Sisolak*, 137 P.3d 1110, 1125-1127 (Nev. 2006), *cert. denied*, 127 S. Ct. 1260 (2007). The state court's ruling in *Sisolak* upheld a $6.5 million takings judgment in favor of an owner of land near the airport, even though the owner had *not* been prevented from making substantial and beneficial use of his property (indeed, consistent with the height restrictions, a 600-room resort hotel and casino was authorized to be built on the land, albeit at a slightly lower height than first requested).

The ruling in the instant case further exacerbates the situation. Here, the United States Court of Appeals for the Ninth Circuit affirmed a second multimillion-dollar damage judgment against Clark County for another nearby landowner based on the same *per se* state takings claim. The Ninth Circuit did so by misreading this Court's precedent, and despite its express conclusion that there was no compensable taking under federal law. *Amici* here, who also filed a brief in support of the petition for a writ of *certiorari* in the *Sisolak* case, renew their request that this Court review this matter of extreme importance to the future functioning of our National Aviation System.

A. This Case Is Indicative Of A Gathering Storm That Threatens The Future Of Our National Aviation System, And It Presents This Court With An Ideal Opportunity To Avoid That Result

1. This second multimillion-dollar judgment against petitioner will undoubtedly lead to many other such lawsuits

Owners of property near Nevada airports are now entitled to automatic compensation under state law for the taking of the airspace above their land when local zoning ordinances impose height restrictions, even though the restrictions are reasonable and necessary to prevent hazardous obstructions that could interfere with the safe takeoff and landing of aircraft. By requiring payment even to those property owners who retain the ability to make economically beneficial use of their land consistent with the zoning limitations, Nevada's *per se* takings claim deviates sharply from the nuanced three-factor federal takings analysis articulated by this Court in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978).[2] Thus, as the Ninth Circuit recognized, the landowners who were awarded millions in the state law takings actions in *Sisolak* and in the instant case would not have been entitled to any compensation under federal law.

This new standard has a potentially staggering effect on local governments that are responsible for the protection of airport safety. In Nevada alone there are 51 public airports with even more individual runways. Many of the local governments in Nevada's 17 counties have enacted zoning ordinances to regulate the height of structures near these airports. *See, e.g.*, Washoe County, Nev. Development Code § 110.402.10(e) (1998) (height restrictions applicable to certain land surrounding

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[2] *Penn Central* requires, *inter alia*, consideration of the zoning regulation's economic impact on the landowners, particularly the extent to which the regulation interferes with their investment-backed expectations, and the character of the regulation. *Ibid.*

Reno/Tahoe International Airport); Carson City, Nev. Code § 16.02.030 (2007) (Carson Airport). Each local government that has enacted height-restriction zoning ordinances in cooperation with the FAA is now threatened with the prospect of multimillion-dollar takings judgments in favor of the landowners near the airports.

There are likely to be many such landowners. In Las Vegas alone, "there are 3,554 acres within a 20,000-foot radius of [McCarran] airport boundaries that have zoning similar to that of the land on which damages were awarded" in *Sisolak*. Richard N. Velotta, *Airport Land Use: Lawsuits Could Prompt Cuts At Las Vegas Airport*, THE LAS VEGAS SUN, May 28, 2003. The hefty size of the awards in *Sisolak* ($6.5 million in compensatory damages) and in the instant case ($10 million in total) will most certainly generate additional claims against petitioner and many other Nevada localities.

The impact of Nevada's state takings ruling may ultimately extend well beyond its borders because Nevada is not the only State that has interpreted its own constitutional takings clause to provide greater rights for property owners than the federal Constitution.[3] Prompted by Congress and the FAA, local governments around the country have enacted zoning ordinances that restrict the height of structures near airports.[4] The holding below serves up a compelling financial incentive for a flood of follow-on demands by landowners who, without having to demonstrate diminution of their property's value, will claim a taking of "their" airspace near every airport where

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[3] *See, e.g., City of Norwood v. Horney*, 853 N.E.2d 1115, 1136, 1141-1142 (Ohio 2006); *Board of County Comm'rs v. Lowery*, 136 P.3d 639, 651 (Okla. 2006); *Manufactured Hous. Communities of Washington v. State*, 13 P.3d 183, 187-190 (Wash. 2000).

[4] *See, e.g.*, Adams County, Colo. Development Standards & Regulations § 3-29-05-02-09 (2007); Miami-Dade County, Fla. Code § 33-335 (2007); Broward County, Fla. Code § 39-359.2 (2007); Phoenix, Ariz. Code § 4-240 (2007); San Diego, Cal. Code §§ 132.0201-132.0209 (2006); Jacksonville, Fla. Code § 656.10051 (1999); Loudoun County, Va. Zoning Ordinance § 4-1404(B)(3), (D) (1998).

zoning height restrictions have been adopted. It is not at all surprising that such airspace takings actions have already begun to appear in other States. *See, e.g.*, *Dutta v. County of El Dorado*, No. PC 20070464 (Calif. Super. Ct., El Dorado County) (complaint filed Jul. 31, 2007).

2. The instant case is an ideal vehicle for this Court's resolution of the preemption issue

This particular case provides an ideal vehicle for the Court's review of the question of whether federal aviation statutes and regulations ever preempt state law takings claims involving the nation's navigable airspace.

First, the Ninth Circuit assessed respondents' claim under both federal and state takings law and concluded that there was no compensable taking under the federal Constitution. Pet. App. 18a.[5] Because the Ninth Circuit ruled that an award of compensation was permissible only under state law, this Court's review of the case would be able to focus on the discrete question whether a State's takings law that exceeds federal takings standards is preempted because it frustrates the purposes of the congressionally crafted airspace management regime.

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[5] The Ninth Circuit's holding on the federal takings claim is not subject to dispute. There is no *per se* taking under federal law because there was not a permanent physical invasion of respondents' property, nor were respondents deprived of all economically beneficial uses of the property. *See Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538 (2005) (describing limited circumstances when a *per se* taking exists under federal Constitution); *see also United States v. Causby*, 328 U.S. 256, 266 (1946) (holding that "[f]lights over private land are not a taking" unless they are "so low and so frequent" that they render the subject property uninhabitable or destroy existing businesses on the property); *Griggs v. County of Allegheny, Pennsylvania*, 369 U.S. 84, 88 (1962) (same). Furthermore, as the Ninth Circuit properly recognized, petitioner's zoning restrictions do not qualify as a compensable federal taking of respondents' property under the three-factor analysis of *Penn Central*. *See Lingle*, 544 U.S. at 540 ("the *Penn Central* inquiry turns in large part, albeit not exclusively, upon the magnitude of a regulation's economic impact and the degree to which it interferes with legitimate property interests").

Moreover, a case presenting a clear conflict between state law and the federal scheme for regulating navigable airspace (*i.e.*, where there is a holding that the local zoning ordinance effects a taking under state but not federal law) is not easily replicable. State and federal takings claims are rarely adjudicated in the same proceeding.[6] But as a result of bankruptcy jurisdiction, the state and federal takings claims here were considered in a single forum, with diverging outcomes.

3. The Ninth Circuit's misreading of this Court's opinion in *Jankovich* to establish a categorical non-preemption rule requires this Court's intervention

The Ninth Circuit relied on this Court's decision in *Jankovich*, 379 U.S. at 487, to reject the preemption argument in this case. The lower court viewed *Jankovich* as presenting a "substantially similar issue" and a holding that had not been called into question. Pet. App. 19a-20a. The Ninth Circuit's language indicates that it read *Jankovich* to preclude categorically any assertion that federal law preempts state airspace takings claims.

But *Jankovich* does not control the preemption question in this case. The state test for assessment of a taking in *Jankovich* did not appear to exceed the standards used for federal takings law at that time,[7] and

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[6] This may be because federal law normally requires plaintiffs to pursue compensation through mechanisms provided under state and local law before pursuing federal claims. *See Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985).

[7] *Compare Indiana Toll Road Comm'n v. Jankovich*, 193 N.E.2d 237, 240 (Ind. 1963) ("[T]he *reasonable and ordinary* use of air space above land is a property right which cannot be taken without the payment of compensation." (emphasis added)), *cert. granted*, 377 U.S. 942 (1964), *with Griggs*, 369 U.S. at 88-89 (recognizing that use of land presupposes ordinary use of some airspace for structures on the land), *and Causby*, 328 U.S. at 264 (similar). Indeed, the Indiana court relied in part on *Griggs* and *Causby* in applying its state standard. *See Jankovich*, 193 N.E.2d at 240.

the application of the particular zoning regulation at issue in *Jankovich* likely constituted a taking under federal law.[8]

Moreover, it is not at all clear that *Jankovich* even addressed what is now commonly described as "frustration-of-purpose" conflict preemption. This Court granted *certiorari* in *Jankovich* "[b]ecause it appeared that the case involved the [constitutionality] of airport zoning regulations." 379 U.S. at 489. The Court dismissed the writ of *certiorari* as improvidently granted, however, because it turned out that the Indiana standard (like the federal standard) applied only to "ordinarily usable air space" and thus did "not porten[d] the wholesale invalidation of all airport zoning laws." *Id.* at 493. Not surprisingly, in that limited context (*i.e.*, where the State's takings law appeared to be commensurate with federal takings law), this Court concluded that the preemption assertion was "insubstantial." *Id.* at 492 n.2, 494.

In contrast with the takings standard in *Jankovich*, Nevada's airspace takings law plainly and sharply deviates from federal takings standards under *Penn Central* by declaring that any height restriction on the first 500 feet of airspace effects a taking *per se*. *Jankovich* simply did not speak to the question that Nevada's *per se* standard clearly presents here: whether a State's airspace takings law is preempted where it exceeds federal takings standards. In any event, for the myriad frustration-of-purpose reasons discussed *infra*, if *Jankovich* is properly read as controlling in this context, *amici* urge the Court to take this opportunity to overrule that decision.

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[8] The regulation imposed a height limitation of 18.5 feet, although the toll road had been constructed at a height of 25 feet. *Jankovich*, 193 N.E.2d at 238. The toll-road operator contended that such a drastic restriction robbed the land of its reasonable, economically beneficial use and thus effected a federal taking. *See* Br. of Resp. at 36-53, *Jankovich v. Indiana Toll Road Comm'n*, 379 U.S. 487 (1965) (No. 60).

B. Federal Law Preempts State Law Claims That Interfere With The Cooperative Regulatory System That Congress Has Authorized And The FAA Enforces In Conjunction With Local Governments

1. Our complex National Aviation System functions safely and efficiently because it is based on cooperative federalism

As Justice Jackson observed more than 60 years ago, "[p]lanes do not wander about in the sky like vagrant clouds." *Northwest Airlines, Inc. v. Minnesota*, 322 U.S. 292, 303 (1944) (Jackson, J., concurring). In other words, aircraft travel within a highly regulated, closely monitored, and intricately complex system. *See City of Burbank v. Lockheed Air Terminal Inc.*, 411 U.S. 624, 638-640 (1973). Today more than ever, the network of air transportation in this country is vast, complicated, and interconnected. Federal law fully recognizes that the efficient and safe operation of the National Aviation System requires cooperation between federal regulators and the local governments that often own and operate the nation's airports. Federal law also envisions that these entities will work together to implement programs that advance federal aviation objectives.

a. To understand why cooperation between local governments, the FAA, and Congress is critical to the provision of safe and efficient public air transit, one need only consider the scope and scale of the modern National Aviation System. There are more than 5,000 public-use, and over 9,000 private-use, airports in the United States. *See* FAA Airport Facilities Data Report worksheet.[9]

Approximately eighty percent of the public-use airports, including all of the larg ommercial airports, are owned or operated by local governments. *Ibid.* Collectively,

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[9] Data compiled after performing parameter search at http://www.faa.gov/airports_airtraffic/airports/airport_ safety/airportdata_5010/.

these airports operate nearly 18,000 runways, *ibid.*, and handled more than 61 million takeoffs and landings last year alone, *see* Federal Aviation Administration, *FAA Aerospace Forecasts: Fiscal Years 2007-2020*, at 21 (2007).[10]

Our commercial aviation system carried an estimated 740 million passengers in 2006. *Id.* at 64. And the FAA projects that by 2015, the National Aviation System will accommodate nearly 74 million takeoffs and landings yearly, *id.* at 90, with the total flying public soaring to more than one billion annually, *id.* at 64.

b. Congress has made clear that "the safe operation" of our complex airport and airway system is our nation's "highest aviation priority." 49 U.S.C. § 47101(a)(1); *see also id.* § 40103(a)(2) (recognizing that safe public travel by air furthers both the national interest and the public welfare of local communities served). Congress has charged the FAA with responsibility to "maintain the safety vigilance that has evolved in air transportation and air commerce and has come to be expected by the traveling and shipping public." *Id.* § 40101(a)(3). Moreover, Congress has expressly called for programs that encourage airport proprietors (such as local governments) to improve capacity, safety, and efficiency, *id.* § 47101(a)(7), thus "promoting, encouraging and developing civil aeronautics and a viable, privately-owned United States air transport industry." *Id.* § 40101(a)(14).

Federal law recognizes that federal control over airspace management is a critical component of achieving the goal of safe and efficient public air transit. Congress has declared unequivocally that "[t]he United States Government has *exclusive* sovereignty of airspace of the United States." *Id.* § 40103(a)(1) (emphasis added); *see also Northwest Airlines*, 322 U.S. at 303 (Jackson, J., concurring) ("The air is too precious as an open highway to permit it to be 'owned' to the exclusion or embarrassment of air navigation by surface landlords who could put it to

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[10] *Available at* http://www.faa.gov/data_statistics/aviation/aerospace_forecasts/2007-2020/media/FORECAST%20BOOK%20SM.pdf (last visited Nov. 15, 2007).

little real use."). Congress has given the FAA broad authority over the navigable airspace, including authority to "develop plans and policy for the use of the navigable airspace" and to regulate the use of the airspace as necessary to ensure its safe and efficient use. 49 U.S.C. § 40103(b)(1); *see also* 49 U.S.C. § 40102(a)(32) (defining "navigable airspace" to mean "airspace above the minimum altitudes of flight prescribed by [FAA] regulations * * * including airspace needed to ensure safety in the takeoff and landing of aircraft").[11]

c. Because it is the local governments, not the federal government, that own and operate civilian airports, regulatory cooperation between the federal and local governments is of paramount importance to the prevention of aviation safety hazards. The federal government provides local governments with significant federal funding to build, maintain, and expand local airport facilities through grants from the Aviation Trust Fund. Before a local government may receive a grant through this program, however, Congress requires the FAA to receive certification from the grant recipient that "appropriate action, *including the adoption of zoning laws*, has been or will be taken to the extent reasonable to restrict the use of land next to or near the airport to uses that are compatible with normal airport operations." *Id.* § 47107(a)(10) (emphasis added).

To facilitate the adoption of uniform and consistent zoning regulations with respect to property near airports, the FAA has even issued a "Model Zoning Ordinance," which recognizes that "[a]viation safety requires a minimum

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[11] According to FAA regulations, the prescribed minimum flying altitude in uncontested areas is 500 feet AGL, "[e]xcept when necessary for takeoff or landing." 14 C.F.R. § 91.119. Consequently, before the Nevada Supreme Court rendered its unqualified state airspace takings ruling, all of the actors involved in the air transportation industry shared a common legal view that even the airspace *below* 500 feet AGL was open to the flying public if necessary for the safe takeoff and landing of aircraft, and could be regulated to prevent future uses that would create a hazard to air navigation.

clear space (or buffer) between operating aircraft and other objects." Federal Aviation Administration, Advisory Circular 150/5190-4A, *A Model Zoning Ordinance to Limit Height of Objects Around Airports*, at 1, § 3(a) (Dec. 14, 1987).[12] The zoning regulations at issue in this case draw from the model ordinance and likewise address the safety need for a buffer zone between aircraft and ground objects.

The FAA has also developed procedures that work in conjunction with local ordinances to provide a context-specific, case-by-case inquiry into whether a particular nonaviation usage of airspace can be accommodated without a decrease in the safety of, and the capacity for, aircraft takeoffs and landings. *See generally* 14 C.F.R. Pt. 77.[13] If the agency determines that proposed

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[12] *Available at* http://www.faa.gov/airports_airtraffic/airports/resources/advisory_circulars/media/150-5190-4A/150_5190_4A.pdf (last visited Nov. 15, 2007).

[13] Pursuant to these procedures, the FAA requires that it be notified when anyone proposes to build or alter specified structures near an airport. *Id.* § 77.13. The FAA then conducts aeronautical studies to determine whether the proposed structure would constitute an actual hazard to aviation, including an analysis of whether the proposed structure exceeds "imaginary surface" standards (artificial engineering boundaries drawn in the air around airports). *Id.* §§ 77.31, 77.33, 77.35; *see also* Federal Aviation Administration Order 7400.2E, Procedures for Handling Airspace Matters § 6-3-7, *available at* http://www.faa.gov/airports_airtraffic/air_traffic/publications/at_orders/media/AIR.pdf (last visited Nov. 15, 2007); 14 C.F.R. § 77.25. The most obvious hazard concern is, of course, that airplanes might collide with structures during takeoff and landing. In addition, the existence of tall structures can create visual hazards, such as lighting or glare, that make it difficult for pilots to see the landing approach and interfere with an airplane's navigational equipment or an air traffic controller's radar. Consequently, the FAA works with local authorities to evaluate the land surrounding airports and to analyze proposed ground obstacles based on a variety of parameters.

The FAA will find that development is a hazard only if the aeronautical study results in a finding that its adverse impact on the safe and efficient use of the airspace, facilities, or equipment is substantial. In most instances, the FAA thereafter "negotiate[s] with the proponent [of the construction] during the study process to resolve any adverse effect(s) on aeronautical operations." Federal Aviation

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construction may pose a safety concern and no accommodation can be reached, local land-use authorities look to that hazard determination to ascertain the extent of use that is consistent with public safety and welfare. Thus, the zoning ordinances not only further the federal government's general safety objectives but also implement its particular interest in protecting the traveling public while seeking to accommodate beneficial land use.

2. Nevada's *per se* airspace takings rule is preempted because it interferes with the statutory right of public transit through navigable airspace and the regulatory safety objectives necessary to ensure that right

Congress's purposes in enacting comprehensive aviation statutes that establish a cooperative airspace management and safety system are frustrated in several respects by airspace takings claims that exceed federal takings standards. Although a State's constitution generally may provide broader protection than the Federal Takings Clause, such state law is preempted if it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Sprietsma v. Mercury Marine*, 537 U.S. 51, 63 (2002) (quoting *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995)).

Federal preemption is clear in this case. First, Nevada's *per se* airspace takings rule is based upon the mistaken view that every landowner has a property right to erect a structure of up to 500 feet in height, even if doing so presents an aircraft hazard. But Congress has given the federal government exclusive sovereignty over navigable airspace, including airspace "needed to ensure safety in the takeoff and landing of aircraft," and it has

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Administration, Advisory Circular AC 70/7460-2K, *Proposed Construction or Alteration of Objects that May Affect the Navigable Airspace*, at 6 (March 1, 2000). Many times, a minor alteration will satisfy the FAA's concerns about potential hazards. *See ibid.*

granted the public a right to access such airspace. 49 U.S.C. §§ 40102(a)(32), 40103(a)(2). Nevada's declaration that all airspace beneath 500 feet AGL is unqualifiedly private property diminishes the substantial federal interest in, and Congress's express protection of, the public's right to access the navigable airspace, including the airspace above privately held land. *See id.* § 40103(a)(2), (b)(1).

Second, Congress clearly envisioned that air-transit safety and efficiency would be accomplished through the *cooperative* efforts of federal and local authorities. *See, e.g., id.* § 47107(a)(10). Yet, as detailed in Part B.3, *infra*, a state law airspace takings standard that provides for compensation where there is no taking under federal law has chilling detrimental effects that undermine the incentives of local airport proprietors and zoning authorities to cooperate with the FAA.

Third, Nevada's insistence that either private landowners' nonaviation use of all airspace below 500 feet AGL be accommodated or the landowners be compensated contrasts starkly with Congress's express determination that nonaviation usage of the navigable airspace be accommodated only if it does not "decrease the safety and capacity of the airspace and airport system." *Id.* § 47101(a)(8). Where, as here, the property owner suffers no federal taking and the safety and capacity of the airport system would be compromised without a reasonable height restriction, the State's insistence on compensating private landowners plainly frustrates this congressional mandate.

This Court's ruling in *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988), further confirms that federal law preempts Nevada's *per se* airspace takings claim. In *Boyle*, this Court determined that federal law preempts state civil actions that impose liability upon a government contractor for his performance of duties that promote "uniquely federal interests" at the behest of the federal government. *Id.* at 504-506, 511-512. That important principle is fully applicable here.

3. If the ruling below is not reviewed, there will be dramatic, adverse effects on the safe and efficient use of the nation's navigable airspace

Congress's comprehensive and cooperative regulatory scheme to ensure safe and efficient air transit—*i.e.*, the federal aviation statutes, FAA rulemakings and oversight, federal grants to airports for compatible land use planning and noise abatement, and enforcement of local zoning ordinances—has provided the certainty, stability, and growth that underlies our air transportation network and, in turn, drives our national economic engine. *Amici* and their members are greatly concerned about the many adverse consequences of the Ninth Circuit's failure to recognize that federal law preempts the flawed Nevada Supreme Court airspace takings ruling.

a. Development that poses safety concerns will also affect airport operations and capacity. Airport operators in States that follow Nevada's reasoning necessarily will engage in a different calculus when faced with a hazard determination from the FAA if the ruling below stands. In essence, such local governments will be faced with an impossible dilemma: either forego adoption and enforcement of reasonable zoning restrictions (and potentially the federal grant money that results from zoning assurances) or make costly purchases of the airspace necessary to ensure public access to the National Aviation System.

This Hobson's choice may dramatically affect airport capacity. Local governments that lack sufficient resources to pay landowners may be forced to abandon such ordinances, allowing unconstrained construction near the airports. New structures on surrounding land may present particular safety issues because aircraft will be required to climb more rapidly on departure to avoid the new hazards. The only way to achieve safe clearance of such structures may be to lower aircraft takeoff weight by either reducing the number of passengers and cargo, or by restricting the amount of fuel the aircraft carries, thereby reducing the aircraft's range of flight.

b. Future airport expansion and investment will be limited. If the Ninth Circuit is not reversed, local governments that operate airports in States where compensation is automatically required for height restrictions below 500 feet AGL will be limited in their ability to build or expand runways or airports. *See* Velotta, *Airport Land Use*, *supra*. Where airport operators are uncertain about the risk of liability, they are likely to delay or cancel needed improvements and capacity enhancements. At a minimum, national commerce and the domestic traveling public will be saddled with increased costs that must be passed on by airports subject to *per se* takings liability—as petitioner demonstrates, *billions* of dollars will be added to many airports' operating costs—and those increased costs would likely be for decreased service.

Airlines, too, will have to reassess investment in routes and in larger aircraft. In this age of aviation deregulation, where air carriers make decisions about aircraft usage based on revenue potential, concern about increased landing fees and charges related to the purchase of airspace rights will affect airlines' decisions whether to provide new or additional services.

c. The balance of power between landowners and government entities during hazard negotiations will shift. The prospect of a multimillion-dollar windfall will strengthen each landowner's position in FAA hazard and local zoning negotiations, which, in turn, will affect the rational and negotiated development of the land surrounding airports. McCarran International Airport, for example, is typical of many airports where local authorities built the terminal and runways far away from substantial development, but private development followed the airport and grew up around it.[14] If potential

[14] Thus, neighboring landowners had no reasonable basis for challenging the height restrictions necessary for safe operation of the airport. Indeed, such landowners benefited economically *precisely because* of the property's proximity to such a transit hub. *See, e.g., Adams v. County of Dade*, 335 So. 2d 594, 596 (Fla. Dist. Ct. App. 1976)

(Continued on following page)

hotel and resort owners can threaten to file lucrative takings actions against the local government for enacting the regulatory height restrictions necessary to ensure the safety of arriving and departing customers, there will be little incentive for such owners to negotiate with the FAA and local zoning boards regarding the nature and characteristics of future development. *See generally* Lynda J. Oswald, *Property Rights Legislation and the Police Power*, 37 AM. BUS. L.J. 527 (2000) (when balance between property owners' rights and local governments' police power becomes tilted strongly in favor of the property owners, the larger community suffers).

d. Smaller airports and rural communities will be especially vulnerable. The majority of Nevada's public airports are in rural locations, away from large cities such as Las Vegas and Reno. These modest, but effective, public airport facilities are critical to remote communities because they enable aircraft service for emergency needs (like medical transportation) and economic resources (like tourism). For the most part, however, these airports were never designed to ensure that small aircraft (*e.g.*, Cessnas, Pipers, and Beechcraft) would be able to reach 500 feet in altitude before leaving the airport's boundaries and flying over adjacent lands. Nevada's *per se* takings law, as affirmed by the Ninth Circuit below, would render reasonable height regulations around such smaller airports untenable as well. Thus, without having to satisfy a *Penn Central* takings test, a rancher in rural Nevada may have the same claim to compensation for the regulation of the airspace above his land as the owner of a hotel near McCarran airport in Las Vegas.

e. There will be a ripple effect on nationwide air carrier services. Any airplane passenger whose coast-to-coast

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(in inverse condemnation suit against airport, evidence demonstrated that "not only [was] there * * * no diminution of the value of the property, but, in fact, an increase in the value").

travel has ever been disrupted midway due to inclement weather knows full well the interdependent nature of our National Aviation System. The federal system that guarantees the safe, efficient network that is now a linchpin of the public welfare relies upon many contributors. And expansive, automatic state law airspace takings judgments dramatically change the legal landscape for all of the *amici*. When one major airport must significantly reduce capacity due to fear of *per se* takings liability, airport operators in neighboring States will face an increased regional demand that they may not be able to meet. Indeed, the mere prospect of massive fiscal liability would discourage thousands of relevant state, regional, and local entities from fulfillment of their role in this interrelated system, making a systemic breakdown in the provision of safe and efficient national air transit a realistic possibility.

CONCLUSION

For the reasons set forth above, and to ensure the safe, secure and economical use of our National Aviation System, this Court should grant the petition for a writ of *certiorari* and reverse the judgment below.

Respectfully submitted,

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94

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IN THE

Supreme Court of the United States

CLARK COUNTY, A POLITICAL SUBDIVISION OF THE STATE OF NEVADA,

Petitioner,

v.

VACATION VILLAGE, INC., CEH PROPERTIES, LTD., TIMOTHY S. HEERS, TERRIE HEERS THOMPSON, CHERYL D. NOLTE, GARY R. HEERS, AND CATHLEEN HEERS NORCOTT,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
ARGUMENT	1
CONCLUSION	12

TABLE OF AUTHORITIES

CASES — Page

Boggs v. *Boggs*, 520 U.S. 833 (1997) 9, 11
Griggs v. *Allegheny County*, 369 U.S. 84 (1962) 6
Jankovich v. *Indiana Toll Road Comm'n*, 379 U.S. 487 (1965) 3, 4
McCarran Int'l Airport v. *Sisolack*, 137 P.3d 1110 (Nev. 2006), *cert. denied*, 127 S. Ct. 1260 (2007) 6, 7, 8
Southern Cal. Edison Co. v. *United States*, 226 F.3d 1349 (Fed. Cir. 2000) 2
United States v. *Causby*, 328 U.S. 256 (1946) 6

STATUTES AND REGULATIONS

49 U.S.C. § 40101(a)(4) 9
§ 40103(a)(2) 5
§ 47107(a) 8
§ 47110(c)(1) 9

14 C.F.R. pt. 77 2
14 C.F.R. § 77.23 2
§ 77.25 2

LEGISLATIVE HISTORY

H.R. Rep. No. 88-1002 (1963), *reprinted in* 1964 U.S.C.C.A.N. 2063 9
S. Rep. No. 88-446 (1963) 9

OTHER AUTHORITY

Report of the President's Airport Comm'n, *The Airport and its Neighbors* (May 16, 1952) 9

ARGUMENT

The question presented by this case is critically important. The extraordinary state-law right to compensation that Nevada has recognized—and that the Ninth Circuit held is not preempted—undermines Congress's intent to ensure safe and cost-effective air travel, and will have untoward ripple effects throughout the national aviation system. In its *amicus* filing, the federal government does not argue that respondents' "jurisdictional" issues militate against review of this issue. Instead, it takes the remarkable position that federal law "encourages" municipalities to promote safe and affordable air travel by "relying to the maximum permissible extent on uncompensated zoning," US Br. at 19, yet is wholly indifferent when a State imposes crippling liabilities, potentially totaling *billions* of dollars, on a county that employs federally permissible zoning.

This claim is profoundly misguided. In making it, the government relies on the demonstrably erroneous view that *Jankovich* somehow resolved the pre-emption issue raised here. Its brief also reflects basic misunderstandings about *Sisolak*'s holding and the facts of this case. On these matters, which comprise the bulk of its submission, the government enjoys no expertise. On the preemption issue itself, the government offers a brief and conclusory argument that ignores the statute's text, structure and history, and rests entirely on non-binding guidance from the Federal Aviation Administration (FAA) and on what that guidance "*appears to contemplate*." US Br. at 20 (emphasis added). According to the government, Congress simply expected major airports to re-locate if state law compels them to purchase prohibitively

expensive airspace decades after they began operating.

The government's position appears to be driven by fears of its own potential liability, given its role in defining navigable airspace.[1] *Southern Cal. Edison Co.* v. *United States*, 226 F.3d 1349, 1357 (Fed. Cir. 2000) (government agency owed no deference when it has a financial interest in court's decision). Whatever the reason, the nation's sixth busiest airport, joined by every segment of the typically fractious aviation industry, deserves better. If petitioner is to operate under massive state-imposed takings liabilities—and to pass them on to a struggling airline industry—it should only be because this Court decides, after full briefing and plenary review, that Congress intended to permit such a harmful outcome.

1. The government claims *Jankovich* "clearly . . . determin[ed]" that States can "require compensation for airport-area height restrictions that would not necessarily effect a taking under federal law." US Br. at 11. But the passage from *Jankovich* the government quotes to prove this assertion conclusively refutes it. The government claims that, if the *Jankovich* Court had believed that a State's power to require compensation was "limited to height restrictions that effected a federal taking," then it "could not have concluded that the state court's takings analysis" was consistent with federal law, "while simultaneously 'express[ing] no opinion'" on the federal takings analysis. *Id.* The government cites

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[1] The government denies that role, US Br. at 2, but FAA regulations determine when structures interfere with navigable airspace and thus define the navigable airspace itself. *See* 14 C.F.R. pt. 77, especially Section 77.23 ("Standards for Determining Obstructions") and Section 77.25 ("Civil Airport Imaginary Surfaces").

footnote 3 in *Jankovich* as support for this convoluted reasoning. But footnote 3 disproves its claim.

The ordinance's "validity" under the federal constitution turned on whether it effected an uncompensated "taking of private property for public use in violation of . . . the Fourteenth Amendment." *Jankovich* v. *Indiana Toll Road Comm'n*, 379 U.S. 487, 489-90 (1965). In footnote 3, the Court *declined to decide* whether the ordinance did, or did not, cause a federal taking. *Id.* at 495, n.3. Thus, the *Jankovich* Court:

- had no basis for deciding whether Indiana had recognized a state taking where a federal taking would not be recognized;
- could not have decided, therefore, that the protections of the federal and state takings clauses diverged;
- and accordingly had no conceivable basis for ruling that States can "require compensation for airport-area height restrictions that would not necessarily effect a taking under federal law," US Br. at 11.

Thus, in stating that "no substantial claim can be made that Congress intended to preclude such an application of state law as is involved in the present case," *Jankovich*, 379 U.S. at 494, this Court could not have been referring to an application of state law that exceeded the protections of the federal takings clause.[2]

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[2] Indeed, as petitioner has shown, Pet. at 24-25, and the government nowhere disputes, the ordinance in *Jankovich* caused a federally cognizable taking because it prevented use of respondents' toll road. *Jankovich*, 379 U.S. at 488.

Moreover, the Indiana court's decision precluded consideration of the preemption claim raised here. The state court had "held that the challenged ordinance violated . . . the Indiana Constitution *as well as* the Fourteenth Amendment of the federal Constitution." See Mem. for the United States as *Amicus Curiae* at 2, *Jankovich* (filed Nov. 18, 1964) (emphasis added). Because, unlike the Ninth Circuit below, the state court found takings under *both* state and federal constitutions, the case did not and could not have raised the issue whether federal law preempts "a state constitutional right to compensation for public use of navigable airspace *that causes no federally cognizable deprivation*" of property. Pet. at 18 (emphasis added).

This is why the *Jankovich* petitioners posed a different preemption claim (which the government never bothers to quote). They argued that the state court's "nullification of airport zoning" was "wholly incompatible with the federal scheme," which "is based on the necessity of recourse to airport zoning." Br. for Ptrs. at 53-54, *Jankovich* (filed Oct. 9, 1964), *available at* 1964 WL 81275. This claim thus rested on two premises—*i.e.*, that federal law deemed airport zoning "essential" and that "the decision of the Indiana Supreme Court . . . signifie[d] the total nullification of airport zoning," *Jankovich*, 379 U.S.at 493—neither of which addressed whether the protections of the federal and state takings clauses differed. The Court rejected this different preemption claim because the Indiana court's opinion did "not portend the wholesale invalidation of all airport zoning laws," *id.*—not because federal law permits States to subject airport zoning restrictions to more stringent constitutional requirements than the federal takings clause imposes.

Thus the government's claim that *Jankovich* "address[ed] a preemption question that was not substantively different from the one presented here," US Br. at 12, is just wrong. Accordingly, it is irrelevant that the statutory provision petitioner relies on here (*i.e.*, the public's right of transit under 49 U.S.C. § 40103(a)(2))[3] "existed in essentially [its] current form" when *Jankovich* was decided. US Br. at 11. Petitioner does not claim that everyone in *Jankovich* "overlooked" this provision, *id.* at 12, but rather that the public's right of transit had no bearing on the claim that the Airport Act mandated airport zoning—a claim petitioner is not making here.

In short, the government's characterization of *Jankovich*'s holding is indisputably wrong. Moreover, the government does not even address the argument that, if *Jankovich* did dismiss the preemption claim raised here, it should be reconsidered. On the government's view, the Court determined the preemptive force of a statutory provision that it never mentioned, that the Solicitor General never cited or discussed, and that the petitioners did not rely on. See Rep. Br. of Ptr. at 4 n.3. Such a *sub silentio* disposition of an important, and unlitigated, preemption issue plainly warrants reconsideration in light of the significant effects of the massive state takings liabilities petitioner now faces.

2. Rather than address these effects, the government tries to hedge its bets. It concedes that *Jankovich* "should not be read to hold that federal law places *no* constraints on a State's ability to require compensation for airport-related zoning," but

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[3] Contrary to the government's claim, US Br. at 12, petitioner has not argued that national sovereignty in U.S. airspace preempts respondents' takings claim.

argues that this case is "an unsuitable vehicle for clarifying the possible limits on state authority." US Br. at 16. The government's "vehicle" concerns, however, are equally groundless.

First, it is not at all "unclear," US Br. at 16, whether *McCarran International Airport* v. *Sisolak* mandates compensation in the absence of an ordinance (it does not), or to a landowner who fails to show "that any actual overflights had an adverse impact on the property's value," US Br. at 16, (it indisputably does). *Sisolak* recognized "a regulatory per se taking." 137 P.3d 1110, 1119 (Nev. 2006), *cert. denied*, 127 S. Ct. 1260 (2007). A *regulatory* taking depends upon an ordinance. Indeed, *Sisolak* addressed "whether the *height restrictions* constituted a regulatory per se taking," *id.* (emphasis added), and distinguished the overflight analysis of *United States* v. *Causby*, 328 U.S. 256 (1946), and *Griggs* v. *Allegheny County*, 369 U.S. 84 (1962), based on the ordinances. See 137 P.3d at 1124 ("because this case does involve ordinances affecting use of property, we conclude that a regulatory per se taking occurred without resorting to the low and frequent overflight analysis"). It thus held that "the *ordinances* authorize the permanent physical invasion of [Sisolak's] airspace." *Id.* (emphasis added).

And a compensable *per se* taking under *Sisolak* does not depend on proof that "actual overflights had an adverse impact on the property's value." US Br. at 16. The government suggests Nevada courts might "conclude that, where recurring overflights do not affect the value of the subjacent land, the just compensation owed is zero." *Id.* This is pure fantasy. *Sisolak* upheld a damages award of over $16 million even though the landowner *dismissed all claims alleging property devaluation from overflights.* See

137 P.3d at 1118. In light of the dismissal of those claims, it is clear that *Sisolak* merely requires the *existence* of overflights (otherwise, the Nevada court believed, there is no physical invasion of airspace); their frequency or effect on underlying land, however, is irrelevant.[4]

Nor do the facts of this case pose any obstacle to review. The government notes that the district court found that an increase in overflights "directly, substantially, and immediately interfered with the enjoyment and use of [respondents'] property." US Br. at 17. These findings, however, were made 18 months before *Sisolak*. On appeal, respondents *abandoned* any claim based on overflight impacts and instead argued only that the ordinances "took the[ir] *airspace*," that they had "showed injury in the loss of the subject *airspace*," and that this "taking of the subject *airspace* . . . is a per se taking." Resps. Ninth Cir. Br. at 41-42, 46 (emphases added); see also *id.* at 34-35. Indeed, the Ninth Circuit overturned the district court's damage award because it did not include "just compensation for a taking of airspace" up to the 500 foot level, as *Sisolak* required. App. 22a.[5]

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[4] The *Sisolak* district court based the taking not on evidence of 100 overflights per day, US Br. at 16, but on evidence that, "*on occasion*, aircraft flew over Sisolak's property" below 500 feet above ground level, and on defendants' acknowledgement that aircraft flew over the property at such altitudes. 137 P.3d at 1117 (emphasis added; quotation marks omitted).

[5] The government argues that, because *Sisolak* said that "use of the airspace" may be regulated without causing a taking, it left open the possibility that restrictions higher than Ordinance 1221 might not cause takings where airspace is not "useable." US Br. at 15 (internal quotation marks and citation omitted). That observation is irrelevant here, because this case also involves Ordinance 1221. It is also refuted by *Sisolak*; the

In another misleading suggestion, the government claims respondents' damages will be measured by reference to the diminution in the value of the land, which supposedly demonstrates that the taking "is not fundamentally different from" that in *Jankovich*. US Br. at 17-18. But, as the quotations from the Ninth Circuit and respondents' brief above make clear, respondents' damages are for loss of airspace. The means of calculating their damages do not show otherwise: the value of the airspace is measured by determining the difference in the value of respondents' property with a building *that occupies the airspace* versus its value without such a building. See Resps. Ninth Cir. Br. at 37 (defining "highest and best use" as "a hotel and casino with plans for vertical construction *into the subject airspace*") (emphasis added). Respondents' state-law right to millions of dollars in compensation for an ordinance that causes no federally cognizable taking thus makes clear that a *Sisolak* taking is "fundamentally different" from the taking that occurs when an airport zoning ordinance precludes all use of a toll road. See note 2, *supra*.

3. Finally, the government opposes review because petitioner has supposedly failed to prove its preemption claim. US Br. at 18. Of course, the County has only filed a petition for a writ of certiorari, not a merits brief. Even so, it has shown, Pet. at 19-23, Rep. Br. of Ptr. at 5-7, that Congress strongly encouraged use of zoning to promote aviation safety, 49 U.S.C. § 47107(a)(10); required airports to be financially self-sufficient, *id.* § 47107(a)(13)(A); and established "*economic*, efficient, and *low-priced*

County argued that, as a practical matter, Sisolak had no claim to use of the airspace, but the court rejected this claim "because NRS 493.040 vests ownership in the space above land, up to 500 feet." *Sisolak*, 137 P.3d at 1120 n.26.

services" as a primary goal of federal law, *id.* § 40101(a)(4) (emphases added). A state requirement to pay massive state takings liabilities for the very types of zoning ordinances Congress has actively promoted, and that are permissible under the Fifth Amendment, necessarily conflicts with federal law and "'stands as an obstacle to the accomplishment and execution of" Congress's objective of ensuring air travel that is safe *and economical*. *Boggs* v. *Boggs*, 520 U.S. 833, 844 (1997).

In fact, Congress stressed that, if municipalities lack the authority to adopt zoning restrictions, they need not "undertake action which is neither possible nor practical, *such as . . . purchas[ing] land adjacent to an airport where the sponsor cannot control its use by zoning*." H.R. Rep. No. 88-1002 (1963), *reprinted in* 1964 U.S.C.C.A.N. 2063, 2068 (emphasis added). This is consistent with the recognition that "[t]he cost of acquisition of sufficient land . . . is frequently beyond the capabilities of a single community," Report of the President's Airport Comm'n, *The Airport and its Neighbors* 8 (May 16, 1952), and with Congress's position that it had "no intention of allowing airports to be priced out of existence." S. Rep. No. 88-446, at 24 (1963).

The government simply ignores this evidence of *Congress's* intent, and instead relies on FAA guidance. But the FAA itself encourages municipalities to prevent hazards "by relying to the maximum permissible extent on uncompensated zoning." US Br. at 19. Moreover, the fact that the FAA refuses to permit federal funds to pay for items that are not compensable under federal standards, *id.* at 21, shows that Congress authorized use of federal funds to aquire property interests, 49 U.S.C. § 47110(c)(1), only when necessary to avoid *federal* takings. This

confirms that Congress intended municipalities to pay takings damages only when the federal constitution requires such payment.

Ultimately, the strongest evidence the government musters for its position are statements in FAA guidance that "appear[] to contemplate variations among local property rights regimes." US Br. at 20. But the apparent contemplations of non-binding agency guidance is hardly evidence that Congress intended to permit imposition of massive state takings liability. This is particularly true where the government (1) ignores petitioner's showing that the guidance cannot plausibly be read in this manner, Rep. Br. of Ptr. at 8, and (2) never explains how such an intent can be reconciled with Congress's indisputable desire to promote air travel that is safe *and* economical.

Instead, the government facilely suggests that state law compensation requirements that exceed federal constitutional requirements "may sometimes cause airports to be located in relatively inconvenient venues," but "[m]uch of th[at] inconvenience . . . will be visited locally." US Br. at 20. The facts of this case refute this claim. McCarran was built far from Las Vegas and remained isolated for decades. Pet. at 8. The city encroached upon the airport, and the tourism McCarran facilitated eventually converted the surrounding desert scrub into commercially valuable property. McCarran cannot now relocate to a less convenient locale. Instead, it must compensate landowners, like respondents, who bought property next to a major airport, yet claim the right to build high-rise casinos and hotels next to runways.

These financial burdens, moreover, are *not* "visited locally," US Br. at 20. They must be passed on to the airlines, and eventually to millions of travelers to Las

Vegas each year. Pet. at 20 n.7. Thus, *Sisolak* operates like the kind of state-law tax on interstate travel that the government admits "would raise significant preemption concerns." US Br. at 15. Nevada's attempt to obtain the benefits of the national aviation system, while transferring a central cost of that system—the necessity of navigable airspace below 500 or 1,000 feet—to out-of-state travelers stands as an obstacle to "'the full purposes and objectives of Congress.'" *Boggs*, 520 U.S. at 844.[6]

* * * *

The government's submission reflects an astonishing indifference to an industry reeling from unprecedented congestion and fuel costs, and to the plight of a state entity that has promoted safe and efficient air travel in precisely the manner federal law encourages. This Court should not conclude that federal law is equally indifferent based on misguided claims of *sub silentio* rulings and vague inferences drawn from non-binding guidance. Instead, the Court should grant the petition and resolve the question presented following plenary review.

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[6] Petitioner has never disclaimed preemption based on the extent of the burden *Sisolak* imposes. *See* US Br. at 18. Instead, petitioner has emphasized this very burden in explaining why the *Sisolak* rule is preempted. Pet. at 19-23.

CONCLUSION

For the foregoing reasons and those stated in the petition, reply brief and the *amicus curiae* brief, certiorari should be granted.

Respectfully submitted,

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